

1995

Cummings v. Cummings : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

David A Mcphie; McPhie & Nelson; Attorney for Plaintiff/Appellee.

M. Byron Fisher; James F. Wood; Fabian & Clendenin; Attorneys for Defendant/Appellant.

Recommended Citation

Brief of Appellant, *Cummings v. Cummings*, No. 950504 (Utah Court of Appeals, 1995).
https://digitalcommons.law.byu.edu/byu_ca1/6792

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS

OLETTA CUMMINGS,)	
)	
Appellee,)	
)	
vs.)	Case No. 950504
)	
CLYDE KAY CUMMINGS,)	Priority No.
)	
Appellant,)	
)	
)	

BRIEF OF APPELLANT

Appeal from the Ruling of the Third District Court, Salt Lake
County, State of Utah
The Honorable Glenn K. Iwasaki, Presiding

David A. McPhie
McPHIE & NELSON
2105 East Murray-Holladay Road
Salt Lake City, Utah 84117

Attorney for
Plaintiff/Appellee

M. Byron Fisher, A1082
James F. Wood, A6689
FABIAN & CLENDENIN,
A Professional Corporation
Twelfth Floor
215 South State Street
P.O. Box 510210
Salt Lake City, Utah 84151
Telephone: (801) 531-8900

Attorneys for
Defendant/Appellant

UTAH COURT OF APPEALS

OLETTA CUMMINGS,)	
)	
Appellee,)	
)	
vs.)	Case No. 950504
)	
CLYDE KAY CUMMINGS,)	Priority No.
)	
Appellant,)	
)	
)	

BRIEF OF APPELLANT

Appeal from the Ruling of the Third District Court, Salt Lake
County, State of Utah
The Honorable Glenn K. Iwasaki, Presiding

David A. McPhie
McPHIE & NELSON
2105 East Murray-Holladay Road
Salt Lake City, Utah 84117

Attorney for
Plaintiff/Appellee

M. Byron Fisher, A1082
James F. Wood, A6689
FABIAN & CLENDENIN,
A Professional Corporation
Twelfth Floor
215 South State Street
P.O. Box 510210
Salt Lake City, Utah 84151
Telephone: (801) 531-8900

Attorneys for
Defendant/Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES	-iii-
JURISDICTION	-1-
STATEMENT OF ISSUES PRESENTED FOR REVIEW	-1-
DETERMINATIVE PROVISIONS	-2-
STATEMENT OF THE CASE	-2-
NATURE OF THE CASE	-2-
COURSE OF PROCEEDINGS	-3-
DISPOSITION IN COURT BELOW	-6-
STATEMENT OF FACTS	-6-
SUMMARY OF THE ARGUMENTS	-19-
ARGUMENT	-21-
I. THE TRIAL COURT ABUSED ITS DISCRETION IN STRIKING DEFENDANT'S ANSWER AND ENTERING HIS DEFAULT.	-21-
A. THE ENTRY OF DEFAULT WAS AN ABUSE OF DISCRETION.	-21-
B. THE DEFAULT SHOULD BE SET ASIDE FOR EXCUSABLE NEGLECT.	-25-
II. THE RECORD IS DEVOID OF EVIDENCE SUFFICIENT TO SUPPORT ANY OF THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW.	-26-
A. THE TRIAL COURT ERRED BY NOT UTILIZING THE COURT-APPOINTED EXPERT	-30-
III. THE TRIAL COURT ABUSED ITS DISCRETION IN DIVIDING THE MARITAL ESTATE.	-32-
A. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN AWARDING TO MR. CUMMINGS THE CORPORATION'S PREVIOUSLY TAXED INCOME AS AN ASSET.	-34-

B.	THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN AWARDING INDIVIDUAL CORPORATE ASSETS TO MRS. CUMMINGS UNDER THE THEORY OF ALTER EGO.	-37-
C.	THE TRIAL COURT ERRED IN ITS FINDING OF FACT REGARDING THE VALUE OF THE BUSINESS	-41-
D.	THE TRIAL COURT ERRED IN ORDERING MR. CUMMINGS TO PAY THE MORTGAGE PAYMENT ON THE CORPORATION'S BUILDING WHILE AT THE SAME TIME PAYING A FAIR MARKET RENTAL TO HIS EX-WIFE.	-42-
IV.	THE TRIAL COURT ERRED IN VOIDING AB INITIO THE CUMMINGS FAMILY TRUST	-44-
	CONCLUSION	-45-
	ADDENDUM "A" - FINDINGS OF FACT AND CONCLUSIONS OF LAW SIGNED BY TRIAL COURT ON APRIL 7, 1995 WITH ACCOMPANYING CITES TO EVIDENCE IN RECORD	A-1
	ADDENDUM "B" - TRANSCRIPT OF MARCH 6, 1995 HEARING BEFORE JUDGE IWASAKI	B-1
	ADDENDUM "C" - COURT-APPOINTED EXPERT'S VALUATION REPORT	C-1
	ADDENDUM "D" - COURT-APPOINTED EXPERT'S ANALYSIS OF INCOME AND OTHER BENEFITS RECEIVED BY C. KAY CUMMINGS AND OLETTA CUMMINGS	D-1
	ADDENDUM "E" - CHRONOLOGY OF SIGNIFICANT EVENTS	E-1

TABLE OF AUTHORITIES

<i>Acton v. Deliran</i> , 737 P.2d 996, 999 (Utah 1987)	-26-
<i>Argyle v. Argyle</i> , 688 P.2d 468, 471 (Utah 1984)	-41-
<i>Colman v. Colman</i> , 743 P.2d 782, 787 (Utah App. 1987)	-2-, -38-, -39-
<i>Fife v. Fife</i> , 777 P.2d 512 (Utah App. 1989)	-1-
<i>Hardy v. Hardy</i> , 776 P.2d 917, 923 (Utah App. 1989)	-27-
<i>Howell v. Howell</i> , 806 P.2d 1209 (Utah App. 1991)	-2-
<i>Savage v. Savage</i> , 658 P.2d 1201, 1204 (Utah 1983)	-40-
<i>Schafir v. Harrigan</i> , 879 P.2d 1384, 1389-90 (Utah App. 1994)	-38-
<i>Schoney v. Memorial Estates, Inc.</i> , 790 P.2d 584 (Utah App. 1990)	-1-
<i>State v. Lovegren</i> , 798 P.2d 767, 771 (Utah App. 1990)	-26-
<i>Weston v. Weston</i> , 773 P.2d 408, 410-12 (Utah App. 1989)	-40-, -41-
<i>Wiese v. Wiese</i> , (Utah 1985)	-1-
<i>Wood v. Weenig</i> , 736 P.2d 1053 (Utah App. 1987)	-1-
<i>Woodward v. Fazzio</i> , 823 P.2d 474, 477 (Utah App. 1991)	-1-, -26-, -27-

JURISDICTION

Pursuant to section 78-2a-3(i) of the Utah Code, this Court has jurisdiction of this case which is an appeal of a domestic relations case from the district court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court abuse its discretion in striking Mr. Cummings' answer and entering his default?

Standard of Review: "Management of the actions pending before it is uniquely the business of the trial court and while an appellate court may, of course, intervene if discretion is abused, we accord trial court considerable latitude in this regard and considerable deference to their determinations concerning discovery." *Schoney v. Memorial Estates, Inc.*, 790 P.2d 584 (Utah App. 1990); accord *Wood v. Weenig*, 736 P.2d 1053 (Utah App. 1987) (abuse of discretion standard with respect to default judgment).

2. Are the trial court's Findings of Fact and Conclusions of Law, based on the record evidence before it, clearly erroneous and unjust in that they are unsupported by evidence in the record?

Standard of Review:

(a) "[T]he findings must embody sufficient detail and include enough subsidiary facts to clearly show the evidence upon which they are grounded." *Woodward v. Fazzio*, 823 P.2d 474, 477 (Utah App. 1991).

(b) "[W]e reverse a trial court's finding of fact only if, after marshalling all relevant evidence from the record, the appellant demonstrates that the finding was clearly erroneous." *Fife v. Fife*, 777 P.2d 512 (Utah App. 1989).

(c) "Our standard of review in divorce proceedings allows us to disturb the action of the trial court only when the evidence clearly preponderates to the contrary or the trial court has abused its discretion or misapplied principles of law." *Wiese v. Wiese*, (Utah 1985);

3. Does the trial court's division of the marital estate demonstrate a clear and prejudicial abuse of discretion?

Standard of Review: "Trial courts have considerable discretion in determining alimony and property distribution in divorce cases, and will be upheld on appeal unless a clear and prejudicial abuse of discretion is demonstrated." *Howell v. Howell*, 806 P.2d 1209 (Utah App. 1991).

4. Did the trial court err in piercing the corporate veil, using the doctrine of alter ego, and thereafter awarding corporate assets of C. Kay Cummings Candies, Inc. to Mrs. Cummings, namely the building and land on which the business is located?

Standard of Review: "For purposes of appellate review, the trial court's decision to pierce the corporate veil will be upheld if there is substantial evidence in favor of the judgment." *Colman v. Colman*, 743 P.2d 782, 787 (Utah App. 1987).

DETERMINATIVE PROVISIONS

There are no determinative provisions that control the outcome of this case.

STATEMENT OF THE CASE

NATURE OF THE CASE

Clyde Kay Cummings and Oletta Cummings were married for approximately 40 years. Mrs. Cummings initiated these divorce proceedings in August 1992 and tried unsuccessfully from that time until October 1993 to take control, via conservatorship, of the couple's principal asset, the C. Kay Cummings Candies business on the basis that Mr. Cummings was mentally incompetent. During the period of Mrs. Cummings' unsuccessful takeover

attempt, the trial court exempted Mr. Cummings from the obligation of responding to Mrs. Cummings' discovery requests.

The principal focus of this case is the valuation of the closely held business and the trial court's division of marital assets, which division the court expressed was meant to achieve a 50/50 division of the marital estate. However, the court's division of property did not achieve its expressed intent of an equal split. Using the court's own findings, Mrs. Cummings received about \$225,000 more than her husband. Computed using the court-appointed expert's numbers, Mrs. Cummings received at least \$600,000 more than her husband. The *coup de grace* of the court's findings and conclusions is that they establish Mrs. Cummings as her ex-husband's landlord.

COURSE OF PROCEEDINGS

The genesis of this case began in late 1992 when Mrs. Cummings filed for divorce from her husband of thirty-eight years and attempted to take over the family business. Mr. Cummings voluntarily submitted to several examinations by different medical professionals, and submitted to an involuntary one ordered by the court. All of these examinations determined that Mr. Cummings was mentally fit and able to run his business. This initial salvo from Mrs. Cummings was a precursor of things to come. The entire case has been pockmarked with acrimony between the parties and accentuated by the aggressive representation of Plaintiff's attorney.

After losing her bid to take over the business, Mrs. Cummings began discovery in October 1993.^{1/} To aid in appraising and valuing the business, Mrs. Cummings nominated, and the court appointed David Posey, CPA, as an independent expert. In February 1994 and again in May 1994, during the ongoing discovery, Mr. Cummings had a heart attack, the later one requiring multiple bypass surgery. During the discovery period, Mrs. Cummings frequently complained to the court that Mr. Cummings was not cooperating in a timely fashion.^{2/} This problem was exacerbated by the fact that Mr. Cummings' prior counsel, Earl Spafford, was not the most conscientious about forwarding discovery requests and information supplied by Mr. Cummings on to opposing counsel.

By September 1994, less than one year after discovery began following the lifting of the protective order, the court-appointed expert submitted his valuation report to the court.

^{1/} Mrs. Cummings' attempt to take over the business by way of a conservatorship delayed discovery because the trial court granted a protective order allowing Mr. Cummings not to respond to Plaintiff's discovery requests until after the conservatorship issue was decided.

^{2/} A review of the record indicates that Mr. Cummings generally complied with discovery requests, but plaintiff did not like the answers she got.

Plaintiff's counsel adopted the approach in this case of complaining often, loud, and hard to the trial court until the court ultimately concluded that there must be some substance to Plaintiff's complaints. This is not to say that Mr. Cummings is blameless in this whole matter. However, an even-handed, dispassionate review of the record does not lead one to the conclusion that the entry of default was warranted or justified.

The court never opened or reviewed the report and ordered it sealed. A copy of this report was also submitted to the parties.

In November 1994, the court had Mr. McPhie write a letter to opposing counsel detailing those court orders and discovery requests with which Mr. Cummings had not complied. That letter lists five separate matters, none of which justified the court's decision to default Mr. Cummings.

Beginning in December 1993, a mere two months into the discovery period after the protective order was lifted, Mrs. Cummings began asking for the court to strike Mr. Cummings' Answer. Mrs. Cummings badgered the trial court for thirteen months with her request to strike Mr. Cummings' Answer and enter his default until the trial court, in January 1995, eventually granted her request. Thereafter, Judge Iwasaki held a brief evidentiary hearing in his chambers on March 6, 1995 at which time Mrs. Cummings and Steven Peterson, an accountant not appointed by the court and not previously involved in this matter, testified. The trial court received no documentary evidence and failed to call its own appointed expert, Mr. Posey, to testify. Furthermore, Mr. Posey's two, separate, thorough reports concerning the valuation of the business and the amount of funds withdrawn by Mr. and Mrs. Cummings from the business during the course of the proceeding, were not received as evidence and remain at this moment sealed and unopened in the court's files.

The Decree of Divorce, Findings of Fact and Conclusions of Law were signed by the trial court on April 7, 1995. Shortly thereafter, Mr. Cummings retained present counsel to pursue an appeal of the trial court's ruling. An appeal was filed but was dismissed by this Court for lack of jurisdiction because prior counsel for Mr. Cummings had filed, prior to withdrawing, a motion for a new trial that was still pending before the trial court. After the trial court denied that pending motion, Mr. Cummings filed this appeal.

DISPOSITION IN COURT BELOW

Two and one-half years after Mrs. Cummings filed her Complaint for Divorce, the trial court struck Mr. Cummings' Answer and entered his default. The trial court then held a brief evidentiary hearing, prior to which Mrs. Cummings' counsel had already drafted the Findings of Fact and Conclusions of Law that were ultimately adopted and signed unchanged by the trial court, at which it heard oral testimony and granted a divorce to Mrs. Cummings.

STATEMENT OF FACTS

Although the trial court's files consist of five volumes, the only evidence in the record supporting the Findings of Fact and Conclusions of Law is a fifteen page transcript (containing eight pages of relevant testimony) of a post-default

evidentiary hearing held on March 6, 1995.^{3/} Accordingly, a statement of facts supported by cites to evidence in the record is not possible. Nonetheless, Mr. Cummings attempts to lay out below a chronology of the important events in this case, supported by citations to the trial court's indexed record, that should provide sufficient background for the arguments made below.^{4/}

GENERAL BACKGROUND

1. Mrs. Cummings filed for divorce on August 25, 1992. *Complaint of Mrs. Cummings.*

2. Mr. and Mrs. Cummings were married on July 1, 1954 and had seven children, all of whom were emancipated adults at the time Mrs. Cummings filed for divorce. *Complaint* ¶ 2 & 4.

3. During the course of their marriage, the parties had irreconcilable differences which made the continuation of the marriage impossible. *Id.* ¶ 16.

4. Mrs. Cummings' Complaint lists a general statement of her ex-husband's property, along with an estimate of its value. *Id.* ¶ 20.

5. On September 21, 1992, Mr. Cummings timely filed his Answer to Mrs. Cummings Complaint and denied most of the

^{3/} There are other transcripts of proceedings before Judge Iwasaki. However, none of these were evidentiary hearings.

^{4/} For ease in reviewing the chronology of this case, Defendant has prepared and attached hereto as Addendum "E" a chronology summary.

allegations therein. *Indexed Trial Court Record* ("Indexed Record") at 42-44.

EVENT #1: MRS. CUMMINGS' REQUEST FOR CONSERVATOR AND ATTEMPT TO TAKE OVER FAMILY BUSINESS - AUGUST 1992 TO OCTOBER 1993.

6. Mrs. Cummings' Complaint for divorce included a claim that a conservator be appointed for Mr. Cummings because, his ex-wife alleged, he was unable to manage his property and affairs effectively for reasons of mental illness. *Id.* at 17-18.

7. Mrs. Cummings filed on October 21, 1992 a motion to have the trial court order Mr. Cummings to submit to a mental examination. *Id.* at 61-63.

8. On December 17, 1992, Mr. Cummings filed a motion for protective order requesting that he not be required to respond to Mrs. Cummings' discovery requests until the court had made a determination as to Mr. Cummings' competency and need for a conservator. *Id.* at 229-31.

9. By minute entry dated February 2, 1993, the trial court ordered Mr. Cummings to undergo an independent mental exam regarding his competency. *Id.* at 324.

10. By that same minute entry, the trial court ordered that Mr. Cummings not respond to discovery requests until after his competency and mental status had been determined. *Id.* The trial court's order granting Mr. Cummings' request for a protective order was eventually signed by Judge Iwasaki on August 11, 1993 and stated that "Defendant need not answer plaintiff's

Interrogatories, Requests for Production of Documents, or any other discovery request which would unfairly prejudice the defendant due to lack of mental capacity, until this court determines the defendant's mental capacity." *Id.* at 545-48.

11. On September 3, 1993, Mr. Cummings moved for summary judgment on the issue of his competency and Mrs. Cummings' request for the appointment of a conservator. *Id.* at 563-65.

12. On September 24, 1993, thirteen months into the divorce proceeding, Mrs. Cummings filed on September 24, 1993 a response to Mr. Cummings' motion for summary judgment on the conservatorship issue. *Id.* at 589-91. Mrs. Cummings conceded that summary judgment should be granted, based on the report of her nominated medical expert who had examined Mr. Cummings and found him mentally healthy and competent to manage his personal and financial affairs. *Id.* Mrs. Cummings also requested in this same response that the protective order that allowed Mr. Cummings not to respond to discovery requests be lifted. *Id.*

13. By minute entry dated October 27, 1993, Judge Iwasaki granted Mrs. Cummings' motion to lift the protective order. *Id.* at 622.

14. On February 18, 1994, Judge Iwasaki signed the Findings, Conclusions and Order Dismissing Plaintiff's Petition for Conservatorship of Defendant. *Id.* at 879-83. The trial court's order concluded that Mr. Cummings does not show evidence

of a mental illness and is competent to run his candy business without help from the other members of the family. Accordingly, the trial court dismissed Mrs. Cummings' cause of action for conservatorship. *Id.* at 883.

EVENT #2: CUMMINGS FAMILY TRUST'S MOTION TO INTERVENE - NOVEMBER 1993 TO JANUARY 1994.

15. On November 4, 1993, David Kirby and Ronald Davey, trustees of the Cummings Family Trust, moved the trial court to intervene as third-party plaintiffs on the grounds that the trust owned certain property that was the subject of the divorce action and that the disposition of this property would impair and impede the trust's ability to protect its interest in the property. *Id.* at 624-41. Messrs. Kirby and Davey were represented by separate counsel. *Id.* A separate Third-Party Complaint was filed along with the motion. *Id.*

16. Mrs. Cummings filed an objection to the motion to intervene on January 4, 1994, supported by her own affidavit and that of her attorney. *Id.* at 759-62.

17. On January 10, 1994, the trustees of the Family Trust filed a motion to strike the affidavits of Mrs. Cummings and her attorney, or in the alternative, to allow the trustees to file a reply. *Id.* at 772-76. The reason that the trustees had not filed an earlier reply was because Mrs. Cummings had filed her objection one day before the scheduled hearing. *Id.* at 774-75.

18. Included in the documents submitted to the trial court are copies of the minutes of the December 11, 1984 meeting of the incorporators of C. Kay Cummings Candies, Inc. indicating that the incorporators--C. Kay Cummings, Oletta Cummings, and Gordon Cummings--agreed to issue a "stock certificate in the amount of 1000 shares (100%) to the C. Kay Cummings Family Trust." *Id.* at 798. Also included is the stock certificate issued to the C. Kay Cummings Family Trust for 1000 shares. *Id.* at 796.

19. On January 31, 1994, Judge Iwasaki entered his Findings of Fact, Conclusions of Law and Order denying the motion to intervene on the basis that Mr. Cummings, the third trustee of the Family Trust, could adequately represent the trust's interests and also that the law disfavors intervention "in domestic matters in that it requires the inclusions of non-parties to the marriage, and creates a situation where potentially embarrassing materials are by law required to be given and mailed to non-parties outside the marriage unit." *Id.* at 847-50.

EVENT #3: DISCOVERY AND VALUATION OF BUSINESS - OCTOBER 1993 TO JANUARY 1995

20. By letter dated December 21, 1992 to Commissioner Thomas N. Arnett of the Third District Court, Mr. Cummings' attorney enclosed certain financial documents that the Commissioner had requested, including 1991 federal and state tax returns of Mr. and Mrs. Cummings, a 1991 financial statement for

C. Kay Cummings Candies, Inc., Articles of Incorporation of C. Kay Cummings Candies, Inc., and a certificate of stock listing the Cummings Family Trust as the owner of all outstanding shares. *Id.* at 262.

21. On January 7, 1993, Defendant's attorney wrote Plaintiff's attorney and enclosed certain financial documents that had been delivered in December 1992 to Mrs. Cummings but which her attorney had represented to the trial court had never been delivered. *Id.* at 257.

22. By motion made on July 19, 1993, Mrs. Cummings asked the trial court to appoint David Posey as a Master to aid the Court in establishing the value of the assets of the parties and to prepare an appraisal and evaluation thereof. *Id.* at 408-10.

23. By minute entry dated July 30, 1993, the commissioner recommended to Judge Iwasaki, among other things, that: (1) that David Posey be appointed by the Court as an independent expert to prepare and provide the trial court with a business valuation of C. Kay Cummings Candies, Inc. *Id.* at 531-35

24. On September 13, 1993, Mr. Cummings asked the trial court, among other things, for an order to show cause restraining Mrs. Cummings from coming in or upon the premises of C. Kay Cummings Candies, Inc. during business hours because she

had come into the store and threatened to disrupt its operations. *Id.* at 580-86.

25. By minute entry dated October 22, 1993, Commissioner Evans restrained both parties from having any physical contact with each other at all times and places and that Mrs. Cummings should not go on the business premises during non-business hours and that during business hours she was restrained from that portion of the business premises used by Mr. Cummings as his living quarters. *Id.* at 596.

26. By order dated September 14, 1993, Judge Iwasaki adopted Commissioner Evans' recommendation to appoint David Posey as an independent expert. *Id.* at 531-35.

27. By minute entry dated October 27, 1993, Judge Iwasaki granted Mrs. Cummings' motion to lift the protective order. *Id.* at 622. The order was signed on November 9, 1993 and gave Mr. Cummings thirty days to respond to outstanding interrogatories and document requests. *Id.* at 644-45.

28. Even before the thirty days had passed, on December 1, 1993, Mrs. Cummings moved the trial court, among other things, for contempt and an order to compel an accounting. *Id.* at 648-51. Among other things, Mrs. Cummings complained that Mr. Cummings had failed to answer interrogatories and document requests. *Id.* at 649. She asked the trial court to issue an order compelling Mr. Cummings, on pain of having his answer

stricken and his default entered, to answer interrogatories and produce documents within ten days. *Id.*

29. On December 8, 1993, Mr. Cummings filed a response to Mrs. Cummings' motion for contempt and to compel an accounting and contested her assertions regarding nonpayment of alimony and stated that he had answered Mrs. Cummings' interrogatories. *Id.* at 689-94.

30. By minute entry dated December 9, 1993, Commissioner Evans ordered Mr. Cummings, among other things, to provide an accounting, to pay past-due alimony, and to respond to discovery requests within ten days. *Id.* at 695-96.

31. Mr. Cummings filed a Certificate of Service with the trial court on December 22, 1993 stating that his answers to Mrs. Cummings' interrogatories and responses to her request for production of documents had been hand-delivered to Mrs. Cummings' attorney. *Id.* at 748-49.

32. Mr. Cummings had a heart attack in late January 1994, was hospitalized, and did not return to work until March 15, 1994. *Id.* at 1005-06.

33. On March 21, 1994, Mrs. Cummings moved the court to issue an order striking Mr. Cummings' Answer and to enter his default. In the alternative, Mrs. Cummings requested that, among other things, the court order Mr. Cummings to (1) supplement his answers to interrogatories, (2) provide an accounting as ordered, (3) cooperate with the court-appointed expert in his appraisal of

the business, (4) provide the documents requested in connection with the Family Trust, and (5) refrain from consuming, transferring, or spending the \$306,000 of the business's retained earnings. *Id.* at 898-900.

34. On March 31, 1994, Mr. Cummings filed a verified response and objection to Mrs. Cummings motion, referenced in ¶ 33 above, and proffered, among other things, that: (1) Mr. Cummings had timely delivered his interrogatories to opposing counsel and that they were as complete as he could make them given the information at his disposal, (2) he had cooperated with Mr. Posey, and had instructed all employees of the corporation to cooperate with Mr. Posey, in obtaining an appraisal of the business, (3) Mr. Cummings had not brought the trust documents to his deposition on advice of counsel who had informed him that the Trust was not responsible for answering the subpoena as it was directed to Mr. Cummings, not the trust, and (4) the retained earnings of the corporation, as represented on the tax return, were tied up in inventory, machinery, and other non-cash assets of the business and that it had been the practice of both Mr. and Mrs. Cummings to live frugally and conservatively in order to provide sufficient working capital for the business. *Id.* at 1001-10.

35. On May 10, 1994, Judge Iwasaki signed an Order granting Mrs. Cummings' motion to compel and required Mr. Cummings to supplement his interrogatory answers, to take the

steps necessary to cooperate with Mr. Posey, to allow an appraisal of the building, to provide any and all documents related to the Family Trust, and to pay additional temporary attorney's fees of \$7000 to Mrs. Cummings' attorney. *Id.* at 1022-27.

36. Mrs. Cummings filed another motion for sanctions on June 6, 1994, again requesting that Mr. Cummings' answer be stricken and his default entered. *Id.* at 1050-54.

37. On June 23, 1994, Mr. Cummings filed an objection to Mrs. Cummings' motion for sanctions and stated that he had not yet provided the court-ordered accounting because all of the information had been turned over to Mr. Posey to complete his report. *Id.* at 1069-74.

38. Attached to Mr. Cummings' objection is a letter from Mr. Posey, dated June 20, 1994, stating that he had received all of the requested information from Mr. Cummings, that he had received the appraisal of the building, and that both parties had verbally agreed to use this appraisal in the overall valuation of the business. *Id.* at 1076.

39. Also attached to Mr. Cummings' objection was a letter from Dr. Steven C. Horton, M.D., certifying that Mr. Cummings had been admitted to the hospital on February 6, 1994 after suffering a heart attack, was hospitalized for one week, and was engaged in cardiac rehabilitation for several weeks thereafter. *Id.* at 1075. The letter also indicates that on May

10, 1994, Mr. Cummings was re-admitted to the hospital where he underwent a coronary bypass operation and was discharged on May 18, 1994. He thereafter underwent another period of cardiac rehabilitation. *Id.*

40. By minute entry dated July 11, 1994, Commissioner Evans recommended that Mr. Cummings answer be stricken and his default entered for failure to meet the deadlines imposed previously by the court with respect to discovery. *Id.* at 1138-42.

41. On July 21, 1994, Mr. Cummings filed an objection to the Commissioner's recommendations and asserted that he had in fact complied with the court's prior orders although his health problems had made compliance difficult. *Id.* at 1143-48.

42. On July 26, 1994, Mr. Cummings filed with the court a Certificate of Service Discovery stating that he had mailed the monthly accounting, with exhibits, to opposing counsel, pursuant to Mrs. Cummings' request and the court's order. *Id.* at 1151-52.

43. On September 1, 1994, the court-appointed expert, Mr. Posey mailed his appraisal and valuation report to the court. *Id.* at 1183. That report has never been reviewed by the court and sits unopened and sealed, by order of the court, in the record. A copy of the report was also mailed to both parties. *Id.*

44. On November 7, 1994, Judge Iwasaki, by minute entry, took under advisement the commissioner's recommendation that default be entered. *Id.* at 1212.

45. On November 21, 1994, Judge Iwasaki, by minute entry, again took under advisement the issue under of striking Mr. Cummings' answer and entering his default. *Id.* at 1231.

46. Also on November 21, 1994, the court ordered Plaintiff's attorney to notify Mr. Cummings, "both orally on the telephone and in writing of those items of Discovery the Defendant has not responded to, and in what other areas the Defendant has failed to obey court orders." *Id.* at 1232-33.

47. A letter dated November 10, 1994, purporting to be the letter referred to in ¶ 46 above, was sent by Plaintiff's attorney to Defendant's attorney. *Id.* at 1237-39.

48. On January 11, 1995, at a hearing before Judge Iwasaki, Mr. Cummings was ordered to produce documents, and other discovery by no later than January 18, 1995 that were submitted to him by Mrs. Cummings on December 1, 1994. The court continued to take under advisement the Commissioner's recommendation to strike Mr. Cummings' Answer and enter his default. *Id.* at 1252-53.

49. On January 31, 1995, Judge Iwasaki ordered Mr. Cummings' answer stricken and his default entered.^{5/} *Id.* at 1265-69.

50. On March 6, 1995, Judge Iwasaki held an evidentiary hearing in chambers to receive testimony in support of the Findings of Fact and Conclusions of Law. Plaintiff's counsel came to the hearing with the Findings of Fact and Conclusions of Law already drafted.

51. On April 7, 1995, Judge Iwasaki signed the Findings of Fact and Conclusions of Law. *Id.* at 1295-1311. The Decree of Divorce was also signed on that day. *Id.* at 1326-30.

SUMMARY OF THE ARGUMENTS

Mr. Cummings' arguments on appeal focus on two principal areas: (1) the trial court abused its discretion by striking Mr. Cummings' Answer and entering his default; (2) the trial court's Findings of Fact and Conclusions of Law, with respect to the division of property, are clearly erroneous in that they either do not conform to the scant evidence heard and

^{5/} Judge Iwasaki signed an earlier order, on August 9, 1994, striking Mr. Cummings' Answer and entering his default. *Id.* at 1174-77. This order was apparently entered in error as the parties continued from this time until January 1995 as though no default had been entered. For example, a minute entry dated September 13, 1994 orders oral argument on Mr. Cummings' objections to the recommendations of the Commissioner. *Id.* at 1184. In addition, deposition notices, minute entries, and other pleadings were filed after this apparent order of default.

received by the trial court or they are completely unsupported by evidence in the record.

Mr. Cummings does not dispute that a divorce should be granted or that the marital assets should be divided evenly among the parties. He does dispute, however, the method with which the trial court divided the marital estate. Mr. Cummings' dispute focuses on two principal points. First, the trial court largely ignored its own court-appointed expert who was given the task of valuing the closely held business. Despite having received two separate, detailed reports from Mr. Posey, the trial court failed to have entered as evidence any of Mr. Posey's reports and failed to have him testify as to the proper value to be assigned to the business. Rather, the trial court received oral testimony from Mrs. Cummings and an accountant she brought with her to the evidentiary hearing who had no previous involvement in the case.

Second, the trial court's Findings of Fact and Conclusions of Law are either wholly unsupported or inadequately supported by the evidence in the record. The only evidence presented to the court to support the Findings of Fact and Conclusions of Law is about eight pages of oral testimony. The court received no documentary evidence.^{6/} Furthermore, as Mr. Cummings' default had been entered, he was unable to effectively

^{6/} Counsel came to the hearing with the Findings of Fact and Conclusions of Law already drafted. Transcript of March 6, 1995 hearing before Judge Iwasaki at 12:21-25, 13:1-4.

participate in the post-default proceedings. In this situation, it was incumbent on the trial court to utilize the court-appointed, independent expert, and to take a more active role in determining that the ultimate Findings and Conclusions, drafted by Plaintiff's attorney, were equitable and supported by the evidence. Because the trial court failed to actively participate, opposing counsel had carte blanche with the Findings and Conclusions, as even a cursory review of those documents reveals.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN STRIKING DEFENDANT'S ANSWER AND ENTERING HIS DEFAULT.

A. THE ENTRY OF DEFAULT WAS AN ABUSE OF DISCRETION.

Rule 37 of the Utah Rules of Civil Procedure provides the trial court with various remedies for curing a party's failure to make or cooperate in discovery. Utah R. Civ. P. 37. By far the most drastic of these measures is found in (b) (2) (C) of Rule 37 which allows the trial court to render a judgment by default against the disobedient party. *Id.* 37(b) (2) (C). However, there are several other, less drastic measures available to the court. Short of entering a default judgment, a trial court may enter an order

(1) that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order; (2) refusing to allow the disobedient party to support or oppose designated claims or defenses, or

prohibiting him from introducing designated matters in evidence; (3) treating as a contempt of court the failure to obey any orders; or (4) that the party failing to obey the order shall pay the reasonable expenses, including attorney fees, caused by the failure.

Utah R. Civ. P. 37(b).

In the instant case, the proceedings before the trial court had been ongoing approximately 2 1/2 years at the time the trial court elected to strike Mr. Cummings' Answer and entered his default. However, this time period must be explained in context. For at least the first fourteen months of the proceeding, Mr. Cummings was not obligated by reason of a protective order to respond to Mrs. Cummings' discovery requests. Then, three months after the protective order was lifted, Mr. Cummings suffered the first of two heart attacks, one in February 1994 and another in May 1994. By September 1994, the court-appointed expert had submitted his report to the court and thus had received from Mr. Cummings before that time the requested information on which to base his report.

In November 1994, the court instructed Plaintiff's counsel to compose a letter to opposing counsel detailing those discovery items and court orders with which Mr. Cummings had not yet complied. The letter lists the following items: (1) arrearages in alimony, (2) a court ordered accounting (which Mr. Cummings had submitted twice but which Plaintiff deemed insufficient), (3) appraisal of corporate building (even though

Mr. Posey had already had an earlier one done that was incorporated in his report), and (4) continued deposition of Mr. Cummings. None of these items, when reviewed in context and with the knowledge that Mr. Cummings had attempted to comply with each of them, warrant the trial court's drastic measure of default.

Moreover, the default was entered just three weeks after the trial court stated the following:

I indicated before, I want to allow both parties as much as possible the opportunity to have their day in court, but Commissioner Evans has made this recommendation [of default] to me. it has been pending since four months or so, and I have afforded Mr. Cummings the opportunity to comply with the previous court's orders, which he has done to the main part.

Transcript of January 11, 1995 Hearing before Judge Glenn K. Iwasaki at 26:22-25; 27:1-4 (emphasis added).

Mr. Cummings does not deny that there were delays in responding to discovery requests. In May 1994, for example, Mr. Cummings suffered a heart attack that required multiple bypass surgery. Although this health problem did not affect all discovery requests, it caused some delays. Furthermore, Mr. Cummings made good-faith attempts to comply with the court's orders. Transcript of November 7, 1994 hearing before Judge Glenn K. Iwasaki at 19:5-19 (counsel for Mr. Cummings stating to the court that Mr. Cummings provided to Mr. Posey everything he has asked for).

Given that Mr. Cummings had complied in "main part" to the court's orders, that he was attempting in good faith to

comply with the court's orders, that the court-appointed expert's report had been submitted to the court some four months before the court ordered Mr. Cummings' default, and that the parties were two and one-half years into the proceeding and approaching readiness for trial, it was an abuse of discretion for the trial court to strike Mr. Cummings' Answer and enter his default. There were clearly more appropriate, less drastic, measures available to the trial court short of entering a default. For example, the trial court could have prohibited Mr. Cummings from entering evidence on those issues with which he had not complied or it could have found Mr. Cummings in contempt.^{2/} The fact is, there were other options available to the court short of defaulting Mr. Cummings.

Moreover, the effect of defaulting Mr. Cummings was to severely prejudice him in the division of the marital estate. The Findings of Fact and Conclusions of Law drafted by Mrs. Cummings' attorney and adopted and handed down unchanged by the court are extremely one-sided. Accordingly, Defendant requests that this Court set aside the trial court's entry of default and remand for a trial on the merits.

^{2/} Although Mrs. Cummings urged the court to find contempt on numerous occasions, it never did so. Mrs. Cummings lodged her first motion for contempt less than two months into the divorce proceeding, on October 15, 1992, and seemed to use this threat as a preferred method of attempting to obtain what she wanted.

B. THE DEFAULT SHOULD BE SET ASIDE FOR EXCUSABLE NEGLIGENCE.

This Court has recognized that under appropriate circumstances, reliance by a client on an attorney's assurance that one's rights are being protected could be seen as excusable neglect. *Miller v. Brocksmith*, 825 P.2d 690, 693 (Utah App. 1992).

In the instant case, Mr. Cummings was represented before the trial court by Earl Spafford of the law firm of Spafford & Spafford. Mr. Spafford and his law firm have certainly had, and were having during the course of this case, their own unique problems. The extent to which Mr. Spafford's problems contributed to the delays in discovery will never be known for sure. Mr. Cummings has asserted, however, that on many occasions he forwarded information requested via discovery to Mr. Spafford only to find out later that the information had not been forwarded to opposing counsel. Judge Iwasaki at least hinted of this possible problem during a hearing on January 31, 1995:

I have not enjoyed the same history as Commissioner Evans, but since his recommendation, which I have continued from time to time, I have attempted to allow your client the opportunity to comply with court orders. Now whether it is his problem, whether it is Mr. Spafford's problem, or whether it is your problem [Mr. Harms, an associate of Mr. Spafford], or the contact problems seems to beg the whole question. If in fact, Mr. Cummings has given everything to you and Mr. Spafford, and for some reason you haven't produced it, that's one issue. On the other hand, if in fact, you have been trying with all due diligence to get Mr. Cummings to cooperate and he has not, that's another issue.

Transcript of January 31, 1995 Hearing before Judge Glenn K. Iwasaki, 14:9-20 (emphasis added). Given the myriad of other options available to the trial court and at least the suggestion that part or all of the problem with discovery requests may have been caused by Defendant's counsel, he urges this Court to set aside the entry of default and remand for a trial on the merits.

II. THE RECORD IS DEVOID OF EVIDENCE SUFFICIENT TO SUPPORT ANY OF THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This Court has noted that in divorce proceedings the trial court has considerable discretion in adjusting the financial and property interests of the parties. *Lee v. Lee*, 744 P.2d 1378, 1380 (Utah App. 1987). However, an appellate court only grants deference to the trial court "when [its] findings of fact are sufficiently detailed to disclose the evidentiary basis for the court's decision." *Woodward v. Fazzio*, 823 P.2d 474, 477 (Utah App. 1991); accord *State v. Lovegren*, 798 P.2d 767, 771 (Utah App. 1990) (trial court decision afforded no deference when findings are inadequate). Therefore, for an appellate court "to determine whether the evidence adduced at trial supports the trial court's findings, the findings must embody sufficient detail and include enough subsidiary facts to clearly show the evidence upon which they are ground." *Woodward*, 823 P.2d at 477 (citing *Acton v. Deliran*, 737 P.2d 996, 999 (Utah 1987)).

Mr. Cummings recognizes that he has the burden of marshalling the evidence supporting the trial court's findings

and then demonstrating to this Court that the evidence is inadequate to sustain the findings.^{8/} *Woodward*, 823 P.2d at 477; accord *Hardy v. Hardy*, 776 P.2d 917, 923 (Utah App. 1989). However, if the trial court's findings are insufficiently detailed to disclose the evidentiary basis for the court's decision, an appellate court will not grant the usual deference to the trial court's findings. *Id.*

In the present case, there was not a trial, only a brief post-default evidentiary hearing. Nonetheless, the court's findings must still be adequately supported and must "clearly show the evidence upon which they are grounded." *Id.* Accordingly, unless the evidentiary hearing contains sufficient evidence supporting the trial court's findings, they are inadequate and this Court need not grant any deference to the trial court's ruling.

The only evidence in the record to possibly support the trial court's Findings of Fact and Conclusions of Law comes from the March 6, 1995 evidentiary hearing in Judge Iwasaki's chambers. ^{9/} The entire transcript of this post-default

^{8/} To help meet this burden, Mr. Cummings has set out in Addendum "A" each of the court's findings and conclusions and has cited to the evidence in the record, if any, supporting each specific finding. As even a cursory review of Addendum "A" reveals, many of the findings are unsupported by any evidence and the remaining findings are inadequately supported.

^{9/} Even if documents in the record, other than the oral testimony presented at the post-default evidentiary hearing, were available for reliance in support of the court's findings, a review of the

evidentiary hearing, including two cover pages and reporter's certificate, is fifteen pages and is provided in its entirety in Addendum "B" to this brief. Actual testimony by Mrs. Cummings comprises just over four pages. Testimony by Mr. Steven Peterson, a CPA brought to the hearing by Mrs. Cummings but who had no prior involvement with the case and was not court-appointed, covers about four pages also. No documentary evidence was presented to the trial court, only oral testimony of Mrs. Cummings and Mr. Peterson. Although the court-appointed expert's appraisals and reports were available, they were never opened, reviewed, or used by the trial court.

Regarding the post-default evidentiary hearing, Plaintiff's counsel had the following dialogue with the Court in an earlier hearing regarding the request to default Mr. Cummings:

THE COURT: Isn't it implicit, if not specific, in the proposed order there be a further evidentiary hearing regarding the distribution of assets?

trial court's indexed record demonstrates that no discovery was filed with the court, Mr. Cummings' depositions were never published as part of the record, the court-appointed expert's reports have never been reviewed by the trial court, and any documents in the record preponderate against the findings of the trial court. Furthermore, the various hearings before the Commissioner and Judge Iwasaki never involved the receipt of evidence relevant to the Findings of Fact and Conclusions of Law.

Regarding Mr. Cummings' depositions, plaintiff's counsel requested at the post-default evidentiary hearing that the trial court publish the deposition of Mr. Cummings; the trial court's minute entry reflects this. However, the depositions were never forwarded to the trial court and were never made part of the record before the trial court or on appeal. Transcript of March 6, 1995 Hearing before Judge Glenn K. Iwasaki, 14:1-5.

MR. McPHIE: It's, I think, implicit in the order that this court have a default hearing where my client and my client alone presents evidence to the court, and extensive evidence there will be.

MR. McPHIE: . . . I think the answer should be stricken, the default entered. My client will put on substantial testimony and evidence, documentary and otherwise, as to what the value of the estate -- we are not seeking for anything other than fair distribution of the estate.

Transcript of November 7, 1994 Hearing before Judge Glenn K.

Iwasaki, 10-11:23-25, 1-4; 18:17-21 (emphasis added).

The "extensive evidence," "documentary and otherwise" that Mrs. Cummings promised to present to the trial court supporting the valuation of the estate was never presented. The four pages of oral testimony from Mrs. Cummings and four pages of oral testimony from an accountant who had performed a cursory review of some tax returns was not "extensive evidence." One need only compare this scant evidence with the sweeping findings and conclusions prepared by Mrs. Cummings' attorney and accepted and handed down unchanged by the trial court to understand that the trial court's Findings of Fact and Conclusions of Law are either wholly unsupported or inadequately supported by any evidence in the record. Accordingly, the entire case should be remanded for the taking of further evidence, to be presented by both sides, regarding the valuation of the marital estate.

A. THE TRIAL COURT ERRED BY NOT UTILIZING THE COURT-APPOINTED EXPERT.

Mrs. Cummings nominated, and the trial court appointed, David Posey, CPA, as an independent expert to provide the court with a valuation of the business known as C. Kay Cummings Candies, Inc. Mr. Posey subsequently prepared his report and submitted it to the trial court on September 1, 1994.^{10/} The report of Mr. Posey, however, remains sealed and unopened in the files of the trial court, with a handwritten note attached thereto stating "Do not open by order of the court." *Indexed Record* at 1183. Mr. Posey submitted a Second Report on February 28, 1995 to the Court providing an accounting of all monies and benefits that Mr. and Mrs. Cummings had withdrawn from the business during the divorce proceedings. This report also sits unopened and unreviewed in the court's file.^{11/}

Despite the court's prior appointment of Mr. Posey as its independent expert and his submission of two separate, detailed reports, neither the trial court or Mrs. Cummings utilized Mr. Posey or his reports at the post-default evidentiary hearing. Instead, Mrs. Cummings produced a completely new witness, Mr. Steven F. Peterson, an accountant, who had not been

^{10/} Mr. Posey's report, although sealed and unopened in the court's record, was also provided to the parties. A copy of Mr. Posey's valuation report is attached hereto as Addendum "C."

^{11/} Like the valuation report, this second report was also provided to the parties. A copy of the report is attached hereto as Addendum "D."

previously involved in this case. Furthermore, Mr. Peterson's opinions were based solely upon his cursory review of the individual and business tax returns of Mr. and Mrs. Cummings and the candy corporation, respectively, for 1992 and 1993, along with his review and interpretation of a document prepared by Mr. Posey. Transcript of March 6, 1995 Hearing before Judge Glenn K. Iwasaki, 8:23-25, 9:1-13.

The use of court-appointed experts is clearly discretionary. Utah R. Evid. 706. The rule further provides that "the witness [court appointed expert] may be called to testify by the court or any party." *Id.* In the present case, although the use of the court appointed expert was discretionary, it was incumbent on the trial court to use this expert given that Mr. Cummings was removed from the normal adversarial process and was unable to rebut the evidence, or lack thereof, presented by Mrs. Cummings. The trial court failed to explain why the expert's reports sit unopened and sealed by order of the court and why it failed to have the court-appointed expert testify as to those matters that affected the valuation and division of the marital estate.

Additionally, at the time of the evidentiary hearing, Mr. Posey's involvement in this case spanned over eighteen months, whereas Mr. Peterson's involvement was apparently no longer than a few days. During the eighteen months of Mr. Posey's involvement, he had been deeply involved in reviewing the

books and records of the family business and was eminently qualified to testify as to its value. The trial court's failure to introduce Mr. Posey's reports and to have him testify at the evidentiary hearing was clear error.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN DIVIDING THE MARITAL ESTATE.

The values given the various assets of the parties' marital estate, from both the Findings of Fact and the court-appointed expert's report,^{12/} are as follows:

To Mrs. CUMMINGS:	VALUE PER FINDINGS OF FACT	VALUE PER COURT-APPOINTED EXPERT
Personal Residence and Real Estate	\$ 127,000	\$ 127,000
Real Estate Located at 2057 East 3300 South on which C. Kay Cummings Candies, Inc. is located	\$ 105,000	\$ 105,000
Building located at 2057 East 3300 South housing C. Kay Cummings Candies, Inc.	\$ 587,748	\$ 587,748
One-half of investment accounts	\$ 113,959	\$ 113,959

^{12/} As mentioned earlier, although the expert's report is sealed and unopened in the trial court's file, a copy was mailed to the parties. The values in the second column on business property come from the expert's report. Other amounts, such as the home, personal property, and investment accounts are undisputed by the parties. The PTI account, not specifically addressed in the expert's report, is listed as zero as the expert's affidavit in the court record, prepared by plaintiff's counsel, indicates that the retained earnings of the corporation are tied up in equipment, inventory, and other assets of the business and would thus be inherent in any valuation of the business. *Index Record* at 926-27.

All personal property located in personal residence, with exception of stamp and coin collections	\$ 25,000	\$ 25,000
---	-----------	-----------

Total to Mrs. Cummings:	<u>\$ 997,707</u>	<u>\$ 997,707</u>
-------------------------	-------------------	-------------------

TO MR. CUMMINGS:	VALUE PER FINDINGS OF FACT	VALUE PER COURT-APPOINTED EXPERT
-------------------------	-----------------------------------	---

Retained Earnings: (previously taxed income ("PTI"))	\$ 288,946	\$ 0
--	------------	------

Business value: (without real estate)	\$ 600,000	\$ 481,816
---------------------------------------	------------	------------

Defendant's clothing and personal effects, stamp and coin collections	\$ 5,000	\$ 5,000
---	----------	----------

One-half of investment accounts	\$ 113,959	\$ 113,959
---------------------------------	------------	------------

Assume and pay mortgage on building housing C. Kay Cummings Candies, Inc.	<u>\$235,000></u>	<u>\$235,000></u>
---	----------------------	----------------------

Total to Mr. Cummings	<u>\$ 772,905</u>	<u>\$ 365,775</u>
-----------------------	-------------------	-------------------

Even using the numbers from the trial court's own Findings of Fact, the court's intent of equally splitting the marital estate ended up with Mrs. Cummings receiving almost \$225,000 more than her ex-husband, not to mention the fact that she received all of the hard assets of the marital estate. Mr. Cummings was given only the estimated value of the business, which estimate of \$600,000 is about \$120,000 more than the value assigned by the court-appointed expert. Moreover, the "Retained Earnings" are inherently included in any valuation of the

business, so that the court essentially awarded the same asset twice to Mr. Cummings, thereby inflating and overstating the amount he received. Using the numbers supported by the court-appointed expert's report, Mr. Cummings received over \$630,000 less than his ex-wife. Nowhere in these figures can one find a 50/50 split or an equitable division of the marital estate. Although all of the Findings of Fact are inadequately supported and should be vacated, because of space limitations, Mr. Cummings lays out below only some of the more egregious findings with respect to the division of the marital estate.

A. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN AWARDING TO MR. CUMMINGS THE CORPORATION'S PREVIOUSLY TAXED INCOME AS AN ASSET.

The concept of previously taxed income ("PTI") is an invention of the Internal Revenue Service for determining the proper tax treatment of distributions by a corporation to its shareholders. Treas. Reg. 1.1368-1(d)(2). Regardless of its name, PTI is simply part of a corporation's retained earnings, an accounting concept that represents the difference between a corporation's assets and liabilities. Any valuation of a business inherently includes the value represented by a corporation's retained earnings number. To carve out this figure and award it as a separate, identifiable asset is thus not only incorrect but also counts the same item twice. Furthermore, a corporation's retained earnings are of no benefit to its shareholders unless the corporation has future profits and thus

the ability to distribute cash or property to its shareholders.

In the instant case, the trial court awarded the entire \$288,946.00 of PTI to Mr. Cummings as though that amount were a liquid asset sitting in a bank account. This despite the fact that Mr. Posey had represented the following to the trial court at a hearing on January 11, 1995:

MR. POSEY: Just from what I have heard so far this morning, it appears to me there's a lot of misunderstanding going on here about how the accounting goes for this type of a business. Again, I'm not taking sides, but I think I can help this court understand what has been going on here with this PTI account and all this. And I realize you don't have time right now to get into it, but I would really like an opportunity to clarify how this PTI thing works.

THE COURT: Oh, you're going [to] get that opportunity.

MR. POSEY: It's been represented there's secret accounts and so on. That's nonsense.

THE COURT: This is the PTI income?

MR. MCPHIE: This is the PTI income that he talked about in his deposition.

THE COURT: As I understand, Mr. Posey has indicated, based upon what he has heard in argument, that is going to be addressed.

MR. POSEY: Definitely.

THE COURT: That would give everyone an opportunity to examine it and object to it.

MR. POSEY: Exactly. I submit there's a lot of people who don't understand that, including Mr. McPhie and --

THE COURT: Including the court. That's why you're an expert, I am not.

MR. POSEY: It needs to be clarified.

Transcript of January 11, 1995 hearing before Glenn K. Iwasaki,
pp. 22, 29.^{13/}

^{13/} The January 11, 1995 hearing concluded without Mr. Posey having an opportunity to clarify the PTI issue because Judge Iwasaki had a jury trial waiting to get underway.

The trial court recognized that it did not understand the PTI issue and Mr. Posey stated to the court that Plaintiff's counsel misunderstood the issue.^{14/} Nonetheless, Mr. Posey was never given the opportunity to clarify to the court how the PTI should be treated, if at all. The March 6, 1995 evidentiary hearing had no testimony or documentary evidence at all of the PTI issue, except for the recitation by Plaintiff's counsel as to the amount.

Given the material nature of the PTI account--it represents almost one-third of the assets awarded to Mr. Cummings--and the fact that it was essentially awarded twice to Mr. Cummings, thus overstating and inflating his overall award, it was clear error and an abuse of discretion for the trial court to award this amount to Mr. Cummings in the face of the court appointed expert's assertion to the court that plaintiff's counsel misunderstood the PTI account and the court's own admission that it did not understand the PTI issue.

^{14/} Furthermore, despite the fact that Mr. Posey had stated in an affidavit prepared by Mr. McPhie that "[t]hese 'retained earnings' are not the same as 'cash', as most of the earnings are invested in other assets, such as inventory, equipment, and accounts receivable," *Affidavit of David Posey dated March 10, 1994, Indexed Record* at 926-27, Mrs. Cummings' counsel prepared the Findings, adopted by the trial court, that awarded the PTI to Mr. Cummings as though it were a separate cash asset.

B. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN AWARDING INDIVIDUAL CORPORATE ASSETS TO MRS. CUMMINGS UNDER THE THEORY OF ALTER EGO.

The trial court's Findings of Facts with respect to the corporation state the following:

- (1) the parties incorporated the candy company in 1984;
- (2) the parties had previously operated the business as a partnership;
- (3) the candy company has been a closely held family business with family members holding all of the stock and all of the executive positions therein;
- (4) the parties have ignored corporate formalities to a large extent through the years;
- (5) Mrs. Cummings served as a corporate officer in the corporation until the commencement of the divorce proceedings; and
- (6) Mr. and Mrs. Cummings are each one-half owners of all the stock of C. Kay Cummings Candies, Inc.

FOF 7, 8, 10 & 11. Premised on these findings, the trial court further found that C. Kay Cummings Candies, Inc. "is the alter ego of C. Kay Cummings personally." FOF 9. In the same breath, the trial court found that "there is no advantage to either party, and it has not been requested by either party, that this court make an order concerning the legality, viability, or integrity of that corporation." *Id.* (emphasis added).

Nonetheless, the court used these findings to justify its award to Mrs. Cummings of the corporation's land and building.

With respect to the alter ego doctrine, this Court has stated that "[o]rdinarily, a corporation is regarded as a separate and distinct legal entity from its stockholders. This is true whether the corporation has many stockholders or only

one. Consequently, the corporate veil which protects stockholders from individual liability will only be pierced reluctantly and cautiously." *Colman v. Colman*, 743 P.2d 782, 786 (Utah App. 1987) (citations omitted). This Court has noted that the corporate entity should not be disregarded unless two circumstances are demonstrated: "(1) Such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, but the corporation is, instead, the alter ego of one or a few individuals; and (2) if observed, the corporate form would sanction a fraud, promote injustice, or result in an inequity." *Id.* at 786; *see also Schafir v. Harrigan*, 879 P.2d 1384, 1389-90 (Utah App. 1994). With respect to the sufficiency of the evidence required to pierce the corporate veil, this Court has also held that, "[f]or purposes of appellate review, the trial court's decision to pierce the corporate veil will be upheld if there is substantial evidence in favor of the judgment." *Colman*, 743 P.2d at 787.

The findings of the trial court on the issue of alter ego are clearly erroneous and an abuse of discretion because they are not supported by "substantial evidence" and any evidence that does exist falls hopelessly short of *Colman's* two-prong requirement. Apart from the unsupported and biased testimony of Mrs. Cummings at the post-default evidentiary hearing, which testimony is clearly insufficient to even support the findings for which it was elicited, there is no evidence before the trial

court justifying its use of the alter ego theory and its decision to pierce the corporate veil.

Even if there were substantial evidence regarding the first prong in *Colman*, there is absolutely nothing in the record regarding the second prong, i.e. the corporate form, if observed, would sanction a fraud, promote injustice, or result in an inequity. Moreover, the issue was not even properly before the trial court, expressly or impliedly. *Colman*, 743 P.2d at 785 (stating that court may not base its decision on a theory of recovery not expressly or impliedly raised by parties and not fully tried by parties).

This Court found that the circumstances presented in *Colman* warranted piercing the corporate veil and held that the corporation was the alter ego of the husband. However, there are at least two distinguishing factors between *Colman* and the present case. First, the husband in *Colman* was attempting to exclude from the marital estate various stocks not titled in his name but whose corporations he nonetheless controlled. To avoid injustice and fraud, this Court held that the stocks should be considered part of the marital estate and thus subject to the parties' property settlement agreement.

In the instant case, Mr. Cummings is not attempting to exclude the corporate assets from a valuation of the marital estate. Rather, he asserts that the corporate stock, not the corporation's underlying assets, is the proper asset of the

marital estate. That is, the value of the corporation's stock reflects the value of all the corporate assets and any goodwill associated therewith. Thus, the easiest and cleanest division of property would have been to value the corporate stock and order Mr. Cummings to pay his wife one-half of the value of that stock.^{15/} *Weston v. Weston*, 773 P.2d 408, 410-12 (Utah App. 1989) (involving valuation of closely held stock in division of marital property and noting that "whenever possible, continued joint ownership by divorced spouses of closely held corporate stock should be avoided").

Instead, the trial court wreaked havoc on the corporation by wrenching from it its principal assets, the land and building in which it conducts business, and awarded these as separate assets to Mrs. Cummings. Then, adding insult to injury, the court made Mrs. Cummings the landlord of her ex-husband and ordered his business to pay her both a fair market rent and the mortgage on the building. This despite the fact that the corporation, a separate legal entity, was not a party to the

^{15/} Compounding the problem is the fact that the trial court also found that Mrs. Cummings owns 1/2 of the corporate stock and concluded that she is still vice-president of the corporation. This finding and conclusion clearly flies in the face of the supreme court's admonition that whenever possible continued joint ownership by divorced spouses of closely held corporate stock should be avoided. *Savage v. Savage*, 658 P.2d 1201, 1204 (Utah 1983); accord *Weston v. Weston*, 773 P.2d 408, 410-12 (Utah App. 1989). Furthermore, it is illogical and inconsistent to pierce the corporate veil, divide up and award the business's assets, and then state that Mrs. Cummings owns one-half of the corporate stock and retains her position as vice-president.

divorce proceedings and the Findings of Fact are insufficient to warrant a piercing of the corporate veil under the theory of alter ego. Not only are the trial court's findings clearly erroneous because they are not undergirded by "substantial evidence," but the end result--ex-wife is ex-husband's landlord--violates this Court's clear edict that "[i]t is the court's duty to make a division of the property and income in a divorce procedure so that the parties may readjust their lives to the new situation as well as possible.'" *Weston*, 773 P.2d at 410 (citing *Argyle v. Argyle*, 688 P.2d 468, 471 (Utah 1984)). The situation created by the trial court is untenable and a certain recipe for further litigation and acrimony.

C. THE TRIAL COURT ERRED IN ITS FINDING OF FACT REGARDING THE VALUE OF THE BUSINESS

The trial court's Findings of Facts award the business, without the real estate, to Mr. Cummings and assign a value of \$600,000 to that asset. Nowhere in the record is there any support for this number nor does any of the testimony provided at the March 6, 1995 evidentiary support or even vaguely hint at this number. The transcript of the evidentiary hearing contains only the following dialogue with respect to the value of the business:

MR. MCPHIE:	Do you have an opinion as to what the business is worth, including the land, the building, and the ongoing business concern, the totality of it?
MRS. CUMMINGS:	I think, including all of those things, about a million and a half.

MR. MCPHIE: Have you ever heard Mr. Cummings state an opinion as to what the building is worth?
MRS. CUMMINGS: Yes.
MR. MCPHIE: What is his opinion?
MRS. CUMMINGS: As to what the whole thing is worth?
MR. MCPHIE: The whole thing is worth?
MRS. CUMMINGS: Well over a million, I believe, is what he has said.

Transcript of March 6, 1995 Hearing before Judge Glenn K.

Iwasaki, 5:25, 6:1-12.

Thus, while the court-appointed expert's report lay sealed and unopened in the court files, the trial court allowed Mrs. Cummings, a non-appraiser and non-expert, to give her opinion as to the value of the business and then allowed her to provide hearsay as to what her husband believed it to be worth. Had the court reviewed the court-appointed expert's report, it would have seen that his estimated value of the business, excluding the real estate, was \$481,816. The trial court's Findings of Fact on this issue are wholly unsupported and without any basis in the record evidence whatsoever. Furthermore, the amount exceeds the court-appointed expert's amount by more than \$120,000. Accordingly, this Finding of Fact is clearly erroneous and is an abuse of discretion.

D. THE TRIAL COURT ERRED IN ORDERING MR. CUMMINGS TO PAY THE MORTGAGE PAYMENT ON THE CORPORATION'S BUILDING WHILE AT THE SAME TIME PAYING A FAIR MARKET RENTAL TO HIS EX-WIFE.

Finding of Fact No. 38 finds that Mr. Cummings should "assume and pay debt on the [corporate] land and building as his sole and separate debt, and hold [Mrs. Cummings] harmless

thereon." FOF ¶ 38. In addition, the trial court found that Mrs. Cummings was entitled to \$3,000 per month as a rental payment for the use of the building and land on which the candy company is located. The finding specifically states that this amount is probably not fair rental value and specifically allows for the payment of some new amount based on fair value. FOF ¶ 35.

During the pendency of this appeal, Mrs. Cummings filed a motion with the trial court to increase the monthly rental to almost \$6,000, based on an appraisal authorized and paid for by Mr. Cummings. *Indexed Record* at 1431-70. In her motion to the trial court, Mrs. Cummings took the position that Mr. Cummings is obligated to make the monthly mortgage payment of approximately \$3000 and to then pay her the entire fair market rental value of the property, or another \$6000, for a total monthly payment of roughly \$9000.^{16/} Although Mr. Cummings successfully deferred a hearing on this matter until this Court can resolve the issues on appeal, it is clear from the events that have transpired that the trial court's findings are clearly erroneous and leave Mr. Cummings open to an absurd result, a monthly rental and mortgage payment that exceeds the fair market rental by almost \$4000.

^{16/} Mrs. Cummings, as owner of the building, has also refused to pay the property taxes thereon and routine repair and maintenance for the building. She insists that Mr. Cummings pay these items, despite the fact that she is the owner of the building per the trial court's decree.

Furthermore, the evidentiary hearing of March 6, 1995 contains only Mrs. Cummings' oral testimony about the payment of rent. There was no lease agreement entered as evidence and no other documentary evidence presented to the court justifying the payment of any amounts. Accordingly, the trial court's findings on this issue were clearly erroneous and an abuse of discretion.

IV. THE TRIAL COURT ERRED IN VOIDING AB INITIO THE CUMMINGS FAMILY TRUST

Early on in these proceedings, Mr. Cummings indicated that the stock of C. Kay Cummings Candies, Inc. was owned by the C. Kay Cummings Family Trust, a trust which Mr. Cummings claims was created in 1984 at the same time the business was incorporated, which claim is supported by the minutes of the incorporator's meeting in 1984. *Indexed Record* at 798. Thereafter, two of the trustees of the trust retained separate counsel and brought a motion to intervene in the divorce proceedings of Mr. and Mrs. Cummings. The trial court ultimately denied that request, stating that the interests of the trust were adequately represented because Mr. Cummings, a third trustee, was already before the court and because courts generally disfavor the joinder of parties in domestic matters because of the potential for embarrassing information to be mailed to outside parties. *Findings of Fact and Conclusions of Law* (entered on January 1, 1994 solely with respect to intervention motion),

Indexed Record at 847-50. The trial court's findings made no reference to the viability of the trust. *Id.*

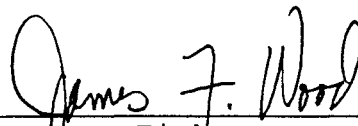
The trial court's ultimate Findings of Fact and Conclusions of Law, entered on April 27, 1995, nonetheless stated: "The trust the Defendant attempted to create in 1984 does not now exist, never existed, and was never funded with marital assets or otherwise." *Conclusions of Law* ("COL"), ¶ 3. Nowhere in the record before the trial court or this Court is there any evidence regarding the creation or viability of the family trust. It simply was not at issue. Rather, the issue before the court was whether the trustee could intervene into the divorce proceeding. Accordingly, this finding and conclusion of the trial court is wholly unsupported by evidence in the record and is clearly erroneous.

CONCLUSION

The trial court clearly erred in defaulting Mr. Cummings when other, less drastic measures, were available. Furthermore, after the default, the trial court erred in failing to obtain adequate and substantial evidence as a basis for its Findings of Fact and Conclusions of Law. This error has led to wholly unsupported findings and conclusions that offend the notions of fair play and equity. For the reasons stated above, Mr. Cummings urges this Court to both set aside the default entered by the trial court and remand this case for the taking of

appropriate and sufficient evidence regarding the appropriate division of the marital estate.

DATED this 7th day of June, 1996.

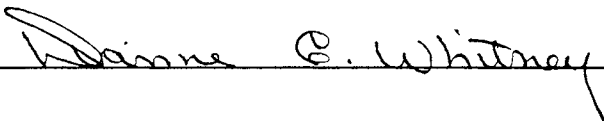
A handwritten signature in cursive script, reading "James F. Wood". The signature is written in dark ink and is positioned above a horizontal line.

M. Byron Fisher
James F. Wood
FABIAN & CLENDENIN,
a Professional Corporation
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 1996, I caused to be hand delivered a true and correct copy of the foregoing BRIEF OF APPELLANT, to:

David A. McPhie, Esq.
McPHIE & NELSON
2105 East Murray-Holladay Road
Salt Lake City, Utah 84117



ADDENDUM "A"

**FINDINGS OF FACT AND CONCLUSION OF LAW SIGNED BY
TRIAL COURT ON APRIL 7, 1995 WITH ACCOMPANYING
CITES TO EVIDENCE IN RECORD**

FINDINGS OF FACT

FINDING No. 1: The parties are husband and wife having been married on the 1st day of July, 1954, in Salt Lake City, State of Utah.

SUPPORTING EVIDENCE IN RECORD: Transcript of March 6, 1995 Hearing before Judge Iwasaki ("Tr.") at 4:13-14.

FINDING No. 2: The parties have been married continuously ever since, or for a period of forty (40) years.

SUPPORTING EVIDENCE IN RECORD: Tr. at 4:15-16.

FINDING No. 3: The parties were both residents of Salt Lake County for the three month period immediately prior to the filing of this Divorce Complaint.

SUPPORTING EVIDENCE IN RECORD: Tr. at 4:9-10.

FINDING No. 4: During the course of this marriage the parties had born to them children, but that all of their children are now emancipated adults. Therefore the Court need not make findings concerning custody, child support, visitation, or an Order to Withhold and Deliver.

SUPPORTING EVIDENCE IN RECORD: Tr. at 4:19-20.

FINDING No. 5: The parties began a candy company which was known as C. Kay Cummings Candy in approximately 1965. The Court further finds that the parties have operated that candy company ever since, and that it has grown substantially in terms of physical size, and volume of business ever since.

SUPPORTING EVIDENCE IN RECORD: Tr. at 4:21-25, 5:1-4.

FINDING No. 6: The plaintiff, Oletta Cummings, played a major role over the years in the building of the candy company by both working there a great deal of the time and by taking care of the children at home and in taking care of the home.

SUPPORTING EVIDENCE IN RECORD:

Mrs. Cummings' testimony only that she played more than a "marriage role" over the years. Tr. at 4:24-25, 5:1-3.

FINDING No. 7: The Court finds that in 1984, the parties incorporated the candy company (which had previously been their partnership) and the company became known as C. Kay Cummings Candy, Inc. The Court, however, also finds that the parties have essentially run the corporation as though it were a partnership ever since its incorporation. The candy company has always been a closely held family business with family members and principally the parties holding all of the stock, and all of the executive positions in the corporation. The Court further finds that the defendant has had, and continues to have, total control of the business, regardless of its corporate form.

SUPPORTING EVIDENCE IN RECORD:

Mr. McPhie: And the business was incorporated in 1984, is that right?
Mrs. Cummings: That's my understanding, yes.
Mr. McPhie: And even though incorporated in 1984, it has always been run principally, and in control of Mr. Cummings, is that true?
Mrs. Cummings: That's true.

Tr. at 5:5-11.

FINDING No. 8: The Court further finds that the parties have ignored corporate formalities to a large extent through the years. As one example, they have had few regular meetings of the board of directors. Only a few sets of minutes of meetings of the Board of Directors exist. Two of the sets of minutes were created by the defendant subsequent to the commencement of this divorce action.

SUPPORTING EVIDENCE IN RECORD:

Mr. McPhie: Over the years the Cummings Candy Company has largely ignored corporate formalities and has been run as a family business, is that true?
Mrs. Cummings: That's true.

FINDING No. 9: The Court finds that C. Kay Cummings Candy, Inc. is the alter ego of C. Kay Cummings personally. The Court also finds, however, that there is no advantage to either party, and it has not been requested by either party, that this Court make an

order concerning the legality, viability, or integrity of that corporation. The Court does, however, find that it must make some decisions concerning the parties' respective rights in the corporation's assets, and that to protect the marital assets, the Court must make some determinations as to the parties' respective offices and positions of control with regard to the corporation. Failure to do so on the Court's part at this time would lead to allowing one party or the other, to eviscerate the Court's proposed decree in this matter, and allow one party or the other to gain an unfair advantage or control over the other in post decree disagreements, which the Court finds are likely to arise.

SUPPORTING EVIDENCE IN RECORD: None.

FINDING No. 10: The Court finds that Oletta Cummings served as a corporate officer in the corporation, and was only recently, and after the commencement of these divorce proceedings, removed as a corporate officer by the defendant. The Court further finds that the removal of Oletta Cummings as an officer and member of the board of said corporation was not with proper notice and violated other corporate law formalities. The Court further finds that all appointments of others as officers and directors of C. Kay Cummings Candy, Inc. to have been without proper notice to the plaintiff and in violation of corporate law.

SUPPORTING EVIDENCE IN RECORD:

Mr. McPhie: Were you ever notified -- excuse me. Have you ever served as vice-president of the corporation and been on its board of directors?

Mrs. Cummings: Yes.

Mr. McPhie: Were you ever notified by anyone of any meeting at which removal of you as vice-president or as a member of the board of directors was going to be discussed or voted on?

Mrs. Cummings: No.

Tr. at 5:16-24.

FINDING No. 11: The Court makes these findings for purposes of allowing the plaintiff to protect her interests in the corporate assets which the Court intends to give her as part of the decree in this matter. The Court further finds that should these steps be inadequate to give both parties equal power and authority over corporate assets further post decree of divorce steps may need to be taken. The Court further finds that the parties are each one-half owners of all the stock of C. Kay Cummings Candy, Inc.

SUPPORTING EVIDENCE IN RECORD: None.

FINDING No. 12: The Court finds that the business, which originally was commenced by the parties in Sugar House, grew and that in approximately 1984, the parties purchased land located at 2057 East 3300 South, Salt Lake City, Utah. The Court further finds that the parties later, through an industrial revenue bond, obtained a loan and built a building on the land located at 2057 East 3300 South, Salt Lake City, Utah, and that they subsequently moved the C. Kay Cummings Candy, Inc. business into that building.

SUPPORTING EVIDENCE IN RECORD: None.

FINDING No. 13: The Court finds that the building, the land, and all the equipment, and assets, have been appraised by a court ordered appraiser, one David Posey, who is an accountant, who has relied on sub-appraisers as to the value of the real estate. The building has been appraised as being worth \$587,748 and the land as being worth \$105,000. The Court further finds that these values are in some question, but that neither party has objected thereto. On the other hand, the Court finds that neither party agrees that \$397,000 is the earning capacity of the business, and that Mr. Cummings has stated in deposition, and to the plaintiff in person, that he believes the appraised value of the business to be worth more than \$1,000,000. The plaintiff testified at the time of the default hearing and that with thirty years experience in the business, she thought it to be worth in excess of \$1,000,000 also. The Court also finds that the appraiser's valuation of the business itself (not the building or land) defined as earning capacity is

incongruent with the defendant's income from the business as referred to in paragraph 30 below. The Court finds the value of the business itself (not including the real estate) to be \$600,000. The Court finds that the land has a value of \$105,000, and the building to have a value of \$587,748 based on the appraisals. The Court further finds that the building and real estate have \$235,000 owed on them to First Security Bank of Utah.

SUPPORTING EVIDENCE IN RECORD:

Mr. McPhie: Do you have an opinion as to what the business is worth, including the land, the building, and the ongoing business concern, the totality of it?

Mrs. Cummings: I think, including all of those things, about a million and a half.

Mr. McPhie: Have you ever heard Mr. Cummings state an opinion as to what the building is worth?

Mrs. Cummings: Yes.

Mr. McPhie: What is his opinion?

Mrs. Cummings: As to what the whole thing is worth?

Mr. McPhie: The whole thing is worth?

Mrs. Cummings: Well over a million, I believe, is what he has said.

Tr. at 5:25, 6:1-12.

FINDING No. 14: The Court finds that the real estate on which the candy company building is built and where the business is transacted is in the name of the parties as joint tenants and always has been. The Court further finds that the parties have leased that land to the business over the years, and that at one time they had a written lease agreement. Said land lease agreement provided that each of the parties would be paid \$500 per month. The Court further finds that in recent years, the parties have orally agreed to a land lease payment from the business to them personally at \$1,500 each per month (\$3,000 per month total). The Court makes no finding as to what the fair lease value of the land and/or building to the business is, but finds that by the course of conduct, \$1,500 each per month from C. Kay Cummings Candy, Inc. to the plaintiff and defendant has become the agreement of the parties.

SUPPORTING EVIDENCE IN RECORD:

Mr. McPhie: Is there a land lease agreement concerning the payment of land lease to you and Mr. Cummings?
Mrs. Cummings: Yes.
Mr. McPhie: Was it originally written?
Mrs. Cummings: Yes.
Mr. McPhie: Was it for 500 a month to each of you?
Mrs. Cummings: That's right.
Mr. McPhie: And over the years, has he changed the amount by oral agreement?
Mrs. Cummings: Yes.
Mr. McPhie: And what is it currently?
Mrs. Cummings: 1500 a month.
Mr. McPhie: Each?
Mrs. Cummings: Each.

Tr. at 6:13-25, 7:1.

FINDING No. 15: The Court further finds that during the course of the litigation in this case which has extended over a period of approximately two and one-half years, the defendant has totally controlled the business, C. Kay Cummings Candy, Inc. The Court further finds that C. Kay Cummings Candy, Inc. is currently behind in its land lease obligations to Oletta Cummings for the months of September 1992 through December 1992, January 1993 through December 1993, January 1994 through May 1994, and December 1994 through September 1995, for a total arrearage spanning twenty-four (24) months and a total arrearage in the amount of \$36,000.

SUPPORTING EVIDENCE IN RECORD:

Mr. McPhie: Is Mr. Cummings current to you, or is the business current to you in payments to you under the land lease agreement?
Mrs. Cummings: No.
Mr. McPhie: How many months behind are they?
Mrs. Cummings: About 24 months. That's a guess.

Tr. at 7:2-7.

FINDING No. 16: The Court further finds that the defendant was ordered to pay Oletta Cummings \$1,663 per month as and for temporary alimony early in these proceedings. This has been the order of the Court

for a period of approximately two and one-half years. The Court further finds that the defendant has tried during the divorce proceedings to get credit against his monthly temporary alimony obligation by sending checks to the plaintiff marked land lease payment, and not sending a separate alimony check to her in the \$1,663 per month amount. The Court further finds that the plaintiff has obtained on two separate occasions judgments against the defendant including attorney's fees arrearages in the alimony obligation and that the Court on two prior occasions found that the temporary alimony obligation, and the land lease obligation of the defendant to the plaintiff are separate obligations, and that the defendant is not entitled to credit for one against the other.

SUPPORTING EVIDENCE IN RECORD: None.

FINDING No. 17: The Court finds that the parties discussed the idea of a family trust in 1984 when the candy business was incorporated. The Court further finds that the notion of a family trust was referred to in some of the documents surrounding the financing of the building and that the parties signed a stock certificate at the time the business was incorporated which purported to transfer the stock of the corporation to a family trust. The Court finds, however, that no trust existed at the time of that transfer and that therefore the purported stock transfer was null and of no effect. The Court further finds that at the time the stock transfer document was executed by the parties, it was anticipated that a subsequent family trust which was yet to be formed, would contain provisions jointly agreed on by the parties. The Court finds that there was no subsequent agreement or formation of a joint trust. The Court further finds that the defendant, by himself, subsequent to the incorporation and the document purporting the transfer of each of the parties' corporate stock to a trust, created his own trust. The Court finds that the defendant could not or did not obtain the signature of his wife on that trust agreement. The Court further finds that the defendant then attempted to create a trust by himself by being the sole trustor and trustee.

The Court also finds that although the defendant had the power to create and fund a trust by himself, he did not by himself have the power to put his wife's share of marital assets into his own personal trust.

SUPPORTING EVIDENCE IN RECORD:

Mr. McPhie: Okay. Has there ever been a family trust that you know of?

Mrs. Cummings: No.

Mr. McPhie: You're aware that Mr. Cummings has alleged there was a family trust created in 1984, is that correct?

Mrs. Cummings: Yes.

Mr. McPhie: Did you ever sign a family trust agreement?

Mrs. Cummings: Not for 1984 trust.

Mr. McPhie: Has there ever been -- did Mr. Cummings ever act as though there was a family trust, in your experience?

Mrs. Cummings: Not when I was with the business.

Mr. McPhie: Up until two years ago?

Mrs. Cummings: Yes.

Mr. McPhie: So from 1994 [sic] up until this divorce action, he did not act as though there were a trust?

Mrs. Cummings: That's right.

Tr. at 7:11-25, 8:1.

FINDING No. 18: The Court further finds that it must make findings with regard to the validity of the purported Cummings Family Trust referred to immediately above in that the defendant has, since a relatively early time in these proceedings, maintained that a family trust exists, and that much of the marital property of the parties is in that trust, and that it is therefore outside the reach of the Court. The Court further finds that in the fall of 1993, while this divorce was pending, and after nine years of ignoring the claimed trust, the defendant unilaterally and without notice to anyone, after nine years of being the sole "trustee" of the "trust," attempted to appoint two co-trustees, had trust letterhead printed, and opened a trust account. All of these activities were the first interest shown by the defendant in the trust that the defendant in nine years time, and only after the divorce action was

commenced. The Court further finds that in the fall of 1993, when this divorce had been pending for approximately one year, the defendant then had his purported newly appointed co-trustees file an action through separate counsel to try and intervene in this divorce action to protect the assets of the so-called trust. The Court notes that this matter of intervention was heard first by the Court's commissioner for domestic matters, Michael S. Evans, and that pursuant to the rules concerning intervention, the commissioner made a recommendation that the co-trustees not be allowed to intervene. That recommendation was appealed to this Court and subsequently sustained. In so doing the Court then found and now finds that the defendant, as the original trustee, and a continuing "trustee" under the defendant's alleged trust, could adequately represent the interest of the trust in the divorce litigation, reserving to the defendant the right to call his alleged co-trustees, or other witnesses at the time of trial. The Court further finds that the defendant had no bank account of any kind for the trust for approximately nine years from 1984 to 1993. That there was no trust letterhead, and that no trust business was conducted. That the trust filed no tax returns until 1993 when the defendant began to realize the weakness of his trust claim, at which time he opened a trust account, had letterhead printed, and began to file trust returns.

SUPPORTING EVIDENCE IN RECORD: None.

FINDING No. 19: The Court further finds that the defendant established or attempted to establish another trust like entity in the late 1980s or early 1990s, giving a new trustee, namely one Frank Pond Reese, control over aspects and assets of the candy company, which the defendant has claimed were transferred earlier into the 1984 trust. That the Court finds this behavior is inconsistent with the notion that the 1984 trust ever existed, even in the mind of the defendant. The Court finds that no other non-business related, non-marital assets, were ever put into the "trust." The Court finds that the Cummings Family Trust does not now exist, specifically that the trust that the defendant purported to try and establish by himself in 1984 never existed, and that none of

the assets of the candy company or the parties are now, or ever were, transferred from the control of the shareholders, or owners of C. Kay Cummings Candy, Inc. The Court further finds that each of the parties hereto each own one-half of the C. Kay Cummings, Candy, Inc. stock and that they each own personally one-half of the land, building, and business located at 2057 East 3300 South, Salt Lake City, Utah, which serves as the premises of the candy company.

SUPPORTING EVIDENCE IN RECORD: None.

FINDING No. 20: The Court further finds that each of the parties personally owned one-half of all other assets of the C. Kay Cummings Candy, Inc. including investment accounts, bank accounts, motor vehicles, equipment, stock, materials, accounts receivable and contracts, and any other property of any description wheresoever situated located at the 33rd South location or at the foothill store.

SUPPORTING EVIDENCE IN RECORD: None.

FINDING No. 21: The Court finds that over the years, and especially since the commencement of this action, the defendant has kept income in the business as taxed but undistributed income. The Court further finds that the amount of money shown on the business tax return for 1993 for previously taxed but undistributed income is \$288,946. The Court further finds that the \$288,946 is money the defendant has chosen to keep in the business and under his control rather than to share with his wife.

SUPPORTING EVIDENCE IN RECORD:

Mr. McPhie: Did you note on the corporate tax return filed for C. Kay Cummings Candy Incorporated in 1993 that the business has retained earnings that the parties have paid personal income tax on?

Mr. Stevenson: Yes.

Mr. McPhie: Do you know without looking at your records - - you my need to look at your records -- how much money was retained by C. Kay Cummings Candy Inc. in 1993 in tax but retained earnings to the parties?

Mr. Stevenson: I would have to look at the return, which I do have in my briefcase.
Mr. McPhie: Let me ask you if the figure \$288,946 rings a bell?
Mr. Stevenson: That sounds approximately correct, yes.

Tr. at 11:9-22.

FINDING No. 22: The Court finds that the parties acquired a home and real estate during the marriage located at 1134 E. Herbert Avenue, Salt Lake City, Utah, which is currently paid for. The Court further finds that said home and real estate is worth approximately \$127,000. Further, the Court finds that said home was purchased by the parties from the plaintiff's parents on favorable terms due to the relationship existing between the plaintiff, defendant, and the plaintiff's parents.

SUPPORTING EVIDENCE IN RECORD: None.

FINDING No. 23: The Court further finds that the parties have been separated for more than two years, and that the plaintiff has resided in the home since the date of the parties' separation. The Court finds that the parties have largely divided between them the personal property that was located in the house in a manner which should be confirmed by the Court, awarding to each of the parties those items of personal property currently in their possession as their sole and separate property, free and clear of any claim of the other party subject only to exceptions which are otherwise specified herein.

SUPPORTING EVIDENCE IN RECORD: None.

FINDING No. 24: The Court finds that the coin collection (silver coins) and the stamp collection, have values of \$422 and \$1,129.80, respectively, and that these should be awarded to the defendant who collected them.

SUPPORTING EVIDENCE IN RECORD: None.

FINDING No. 25: The Court finds that the art work (paintings) of the parties have a value of \$8,194 and should be awarded to plaintiff.

SUPPORTING EVIDENCE IN RECORD: None.

FINDING No. 26: The Court finds that the parties should each be awarded one-half of all stocks, bonds, and other investments acquired during the course of the marriage by the parties or either of them currently held or administered by Smith Barney, or First Western Financial Advisors, or elsewhere regardless of the name the account may be in. These accounts currently have total market value of \$227,918 and each of the parties should be awarded \$113,959 worth. The Court finds that the known investments may be described as and have the values as listed on Exhibit A attached hereto.

SUPPORTING EVIDENCE IN RECORD: None.

FINDING No. 27: The Court further finds that the plaintiff should be awarded the 1993 Oldsmobile as her sole and separate property free and clear of any claim of the defendant.

SUPPORTING EVIDENCE IN RECORD: None.

FINDING No. 28: The Court further finds that each of the parties should be awarded approximately one-half of all other personal property acquired during the course of the marriage not otherwise herein provided for.

SUPPORTING EVIDENCE IN RECORD: None.

FINDING No. 29: The Court finds that determining the defendant's income is problematic. The business, C. Kay Cummings Candy, Inc., has had gross sales in 1992 and 1993 of \$1,125,388 and \$1,281,404, respectively. Although the Cummings' personal tax returns show joint income of \$151,064 and \$205,760 for 1992 and 1993, the defendant has chosen for the parties to live austerely, and has during the last two years of the divorce, while this divorce has been pending chosen to live in a small office at the candy store and to shower at a local gymnasium. In doing this, the defendant has chosen for the parties, instead of taking income, to plow both parties share of the income back into the business as previously taxed and retained income as referred to in paragraph (21), above.

SUPPORTING EVIDENCE IN RECORD: None.

FINDING No. 30: The Court finds that the defendant's stated income at the time of deposition was unusually low. The Court finds that this stated salary is artificially low, and is not reasonably or realistically connected to the amount of money that the defendant could or would but for these divorce proceedings, be making out of the business income. The Court further finds that determining income for support purposes may be different than for IRS purposes (Utah Code Ann. § 7-45-7.5). The Court further finds that a reasonable amount to attribute to the defendant as income, including a salary from the business without putting the cash flow and needs of the business at risk is \$160,000 per year or \$13,330 per month gross. The Court makes this finding based on the testimony of Stephen F. Petersen who reviewed the tax returns of the business for 1992 and 1993, and the parties' for 1992 and 1993, along with the full accounting of David Posey, who testified at the time of the default hearing.

SUPPORTING EVIDENCE IN RECORD:

Mr. McPhie: Okay. Mr. Peterson, have you reviewed the tax returns filed, or the tax returns that I showed you for C. Kay Cummings and Oletta Cummings for their personal returns for 1992 and 1993?

Mr. Stevenson: Yes, I have.

Mr. McPhie: Have you also reviewed the tax returns for the business known as C. Kay Cummings Candy Incorporated for 1992 and 1993?

Mr. Stevenson: Yes, I have.

Mr. McPhie: Have you also reviewed a document which was recently -- you don't know this -- a document that I gave you a few days ago in an envelope supplied by an accountant, Mr. David Posey, that is an accounting concerning monies paid out from C. Kay Cummings Candy Incorporated to Mr. Cummings since 1992?

Mr. Stevenson: Yes, I have.

Mr. McPhie: Have you been requested by me to give an opinion as to how much money Mr. Cummings could take from the business, C. Kay Cummings Candy, Inc. as income without putting the business in jeopardy, annually?

Mr. Stevenson: Yes, I have.

Mr. McPhie: In connection with being asked by me to form an opinion as to that, have you had explained to you the Utah Code section regarding computation of gross income for support purposes?

Mr. Stevenson: Yes, you explained it to me and also gave me a copy of it.

Mr. McPhie: And you understand that gross income for support purposes may not be exactly the same as gross income for IRS or tax purposes?

Mr. Stevenson: Yes.

Mr. McPhie: In forming your opinion as to how much money Mr. Cummings could take from that business, have you done so with the idea in mind that it must be done without putting the business in jeopardy, leaving sufficient cash in the business to meet expected and some unexpected cash needs for the business each year?

Mr. Stevenson: Yes, I have.

Mr. McPhie: Have you ever met Mr. Cummings before?

Mr. Stevenson: Not before this morning.

Mr. McPhie: Have you ever met Mrs. Cummings before?

Mr. Stevenson: Not before this morning.

Mr. McPhie: Are you related to either of them in any way that you know of?

Mr. Stevenson: No.

Mr. McPhie: Have you formed an opinion as to how much money Mr. Cummings could take out of the business annually without putting the business in jeopardy?

Mr. Stevenson: I have.

Mr. McPhie: What is your opinion?

Mr. Stevenson: Based on the records which have been supplied me, it appears that Mr. Cummings could take approximately \$160,000 out of the business, in addition to the land lease payment. This figure would include all building rentals, wages, dividends, personal expenses, things of that nature.

Tr. at 8:23-25, 9:1-25, 10:1-25, 11:1-3.

FINDING No. 31: The Court further finds that the finding in paragraph (30) immediately above is unnecessarily difficult to make because the defendant has refused to participate in the discovery process in ways and to an extent which is documented elsewhere in the file and which ultimately led to his answer being stricken and his default entered.

SUPPORTING EVIDENCE IN RECORD:

The Court: This case is before me on my default calendar due to a ruling that the court has made based upon repeated non-compliance with discovery requests and other problems in the case.

Tr. at 3:17-20.

FINDING No. 32: The Court further finds that the defendant has provided little information over the two and one-half year span of this case concerning his expenses. What little information the Court does have was provided early in the divorce process during a time when the defendant was living at the candy store, apparently the defendant has continued to live at the candy store during these divorce proceedings, obtaining his meals commercially, and showering at a local gymnasium. The Court finds that the defendant cannot reasonably continue to live at the candy store, buy all his meals commercially, and shower at a gymnasium, and that he will ultimately choose, post decree of divorce, to live under less than such austere circumstances, and with no other information available from him but his original declaration of expenses on file, that his monthly expenses are, or will reasonably be, \$1,500 per month.

SUPPORTING EVIDENCE IN RECORD: None.

FINDING No. 33: The Court finds that the plaintiff is employable but all her experience is at the candy company where she has developed experience in all phases of the candy business over a period of thirty plus years, the Court finds that the plaintiff at age 64 is not likely to be retrained in another field or find a job that will pay her more than near minimum wage.

SUPPORTING EVIDENCE IN RECORD: None.

FINDING No. 34: The Court finds that the plaintiff is entitled to both the \$1,500 per month land lease payment for her one-half share of the real estate on which the business is located, and alimony in the amount of \$1,663 per month which has been the temporary order of the Court for two and one-half years. In

making this finding the Court notes that both parties need for support has contracted to meet the money available based on the defendant's unilateral decision to put the parties in an austerity mode during these divorce proceedings. That the defendant has been under court order to pay \$1,663 per month in alimony and under a contractual obligation to pay \$1,500 per month additionally in land lease payments. The Court further specifically finds that the \$3,000 a month that the business has been paying for the land, (\$1,500 to each party) may or may not be the fair monthly lease or rental value of the land itself and is probably not the fair rental or lease value of the land and building.

SUPPORTING EVIDENCE IN RECORD: None.

FINDING No. 35: The Court further finds that the plaintiff is unemployed. She has historically had expenses of \$1,663 per month during these proceedings. The Court finds that it is difficult to set an appropriate alimony amount in this case because of the defendant's failure to participate in the discovery process. The Court notes that in making this alimony finding that the defendant argued on more than one occasion that his temporary alimony obligation should be lowered but in each instance the temporary alimony of \$1,663 was upheld. The defendant, with some prodding, has paid this amount for two and one-half years. The Court finds that Mrs. Cummings is entitled to receive, on a permanent basis, \$1,663 per month as alimony and the income she will receive from the ownership of the land and building, which the Court intends to award her as her one-half share of the marital assets. The Court further finds that C. Kay Cummings can, and has had in the past, the power to pay said alimony and to make sure that C. Kay Cummings Candy, Inc. pays Oletta Cummings a lease payment on the building and real estate, whether it be \$3,000 per month (both halves of the current payment) or some new amount based on fair value.

SUPPORTING EVIDENCE IN RECORD: None.

FINDING No. 36: The Court finds that the best thing for both parties would be to preserve the business, C. Kay Cummings Candy, Inc. as an ongoing concern

operated by the defendant. A sale of the business assets is not an attractive alternative because the income producing capacity and blue sky of the business is closely tied to the defendant operating the business himself, and because of the specialty nature of the business.

SUPPORTING EVIDENCE IN RECORD: None.

FINDING NO. 37: With an eye to dividing the marital assets of the parties in a way which would allow the business to continue in operation and which is most nearly an equitable and 50/50 division, the Court finds a division of the marital assets should be awarded as follows:

TO THE PLAINTIFF:

- a. The home and real estate located at 1134 Herbert Avenue, Salt Lake City, Utah, in align with the value; Value: \$127,000
- b. The ground located at 2057 East 3300 South, Salt Lake City, Utah, which is the real estate on which the business building is located and the business is operated; Value: \$105,000
- c. The building located at 2057 East 3300 South on the above-described land on which the business is located; Value: \$587,748
- d. One-half of the Smith Barney and First Western Advisors investment accounts with values totaling \$227,918, or \$113,959 to her. Value: \$113,959
- e. All personal property currently located in the home and real estate at 1134 Herbert Avenue, including the jewelry in the defendant's possession (the collateral), with the exception of the stamp collection and coin collection.

Estimated value at the time of hearing: \$25,000

TOTAL TO PLAINTIFF: \$997,707

TO THE DEFENDANT:

- a. All of the equipment, materials, stock, accounts receivable, and other personal property of C. Kay Cummings Candy, Inc., including Blue Sky, the van, and the ongoing right to operate the business in the name of C. Kay Cummings Candy, Inc. plus the previously taxed income retained by the business.

Retained Earnings: (previously taxed) \$288,946

Business Value: (without real estate) \$600,000

Total Estimated Value: \$888,946

- b. All the defendant's clothing and personal effects and personal property currently in his possession including the stamp and coin collections; but not the jewelry referred to above; Value: \$5,000
- c. One-half of Smith Barney and First Western Advisors stock and retirement accounts; Value \$113,959

TOTAL TO DEFENDANT: \$1,007,905

SUPPORTING EVIDENCE IN RECORD: None.

FINDING No. 38: The Court further finds that the business C. Kay Cummings Candy, Inc has in addition to paying the \$1,500 per month to each party as a land lease payment, has been making the payment to First Security Bank of Utah for the financing on the land and/or building (current balance approximately \$235,000). The Court finds that the defendant should assume and pay debt on the land and building as his sole and separate debt, and hold the plaintiff harmless thereon.

SUPPORTING EVIDENCE IN RECORD: None.

FINDING No. 39: The Court finds each of the parties should execute all documents needed to carry out the intend of these findings and decree based thereon.

SUPPORTING EVIDENCE IN RECORD: None.

FINDING No. 40: The Court finds that the plaintiff has asked the Court for and received form the Court prior judgments for temporary attorney's fees, which have been paid by the defendant. The Court further finds that in addition to the fees which have been previously awarded and paid, the plaintiff has reasonably incurred the sum of \$2,920 in additional attorney's and paralegal fees, and \$300 in additional costs of court for professional witnesses who testified at the time of the default hearing, namely Stephen F. Petersen.

SUPPORTING EVIDENCE IN RECORD:

Mr. McPhie: Your Honor, we'd submit it. I have -- I'd like to proffer that I have had some additional fees since the court laws awarded temporary fees, and I have an affidavit in support of that.

Tr. at 12:18-21.

CONCLUSIONS OF LAW

CONCLUSION #1: The plaintiff should be awarded a Decree of Divorce dissolving the bonds of matrimony previously existing between the parties. The same to become final upon the signing and entry thereof.

SUPPORTING EVIDENCE IN RECORD:

The Court: The court finds jurisdiction and grounds in this matter and will grant the divorce.

Tr. at 13:5-6.

CONCLUSION #2: The Decree of Divorce should adopt and be congruent with the Findings of Fact outlined above.

SUPPORTING EVIDENCE IN RECORD:

The Court: I expect that the findings and conclusions and the decree be consistent with the testimony and supported by documents in the file, and reflect who also was present here today.

Tr. at 13:7-9.

CONCLUSION #3: The trust the defendant attempted to create in 1984 does not now exist, never existed, and was never funded with marital assets or otherwise.

SUPPORTING EVIDENCE IN RECORD: None.

CONCLUSION #4: Oletta Cummings is the Vice President and a member of the Board of Directors of C. Kay Cummings Candy, Inc., having never been removed from those offices.

SUPPORTING EVIDENCE IN RECORD: None.

ADDENDUM "B"

**TRANSCRIPT OF MARCH 6, 1995 HEARING
BEFORE JUDGE IWASAKI**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * * * *

OLETTA CUMMINGS,)	
)	
Plaintiff,)	
)	
VS.)	CASE NO. 924903713 DA
)	
CLYDE KAY CUMMINGS,)	
)	
Defendant.)	

* * * * *

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(DEFAULT DIVORCE HEARING)

BEFORE THE HONORABLE GLENN K. IWASAKI

SALT LAKE CITY, UTAH

MARCH 6, 1995

COMPUTER-AIDED TRANSCRIPTION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A P P E A R A N C E S

FOR THE PLAINTIFF:

DAVID A. McPHIE
2105 East Murray-Holladay Rd.
Salt Lake City, UT 84117

FOR THE DEFENDANT:

EARL S. SPAFFORD
Trolley Corners, Suite 3-A
515 South 700 East
Salt Lake City, UT 84102

1 SALT LAKE CITY, UTAH; MARCH 6, 1995; A.M. SESSION

2 THE COURT: Mrs. Cummings, if you would stand and
3 be sworn, please.

4 OLETTA CUMMINGS,
5 called as a witness by and on her own behalf, was duly
6 sworn and testified as follows:

7 THE COURT: This is the matter of Cummings v.
8 Cummings. It's case No. 924903713. Plaintiff is present,
9 having been sworn, with David McPhie. Defendant, Clyde
10 Cummings is present, represented by counsel, Earl
11 Spafford. Also present in chambers -- I'm sorry, your
12 name for the record, again?

13 MR. PETERSON: Steven Peterson.

14 THE COURT: Thank you. Mr. Peterson, a CPA,
15 possibly having some testimony regarding some findings in
16 the matter.

17 This case is before me on my default calendar due
18 to a ruling that the court has made based upon repeated
19 non-compliance with discovery requests and other problems
20 in the case.

21 The court ordered the defendant's answer be
22 stricken in this matter and default be set and his default
23 be entered. That is why we are here.

24 Is that correct, Mr. McPhie?

25 MR. MCPHIE: That's correct.

1 THE COURT: Very well. So with that, you may
2 proceed.

3 MR. McPHIE: Thank you.

4 DIRECT EXAMINATION

5 BY MR. McPHIE:

6 Q Oletta, would you state your name and address.

7 A Oletta W. Cummings, 1134 Herbert Avenue, Salt
8 Lake City, Utah.

9 Q Were you a resident of Salt Lake County for three
10 months immediately prior to the filing of this divorce
11 action?

12 A Yes.

13 Q And you were married to C. Kay Cummings when?

14 A July 1st, 1954.

15 Q You have been married to him continuously for 40
16 plus years, is that correct?

17 A Yes.

18 Q You have had children but they are all now grown
19 and emancipated adults, is that correct?

20 A That's correct.

21 Q And you and Mr. Cummings have operated the C. Kay
22 Cummings Candy since 1965, is that correct?

23 A That's correct.

24 Q Did you play more than a marriage role in the
25 candy company over those years?

1 A Yes.

2 Q From its inception to the present?

3 A Yes. Well, until fairly -- until the last couple

4 of years.

5 Q And the business was incorporated in 1984, is

6 that right?

7 A That's my understanding, yes.

8 Q And even though incorporated in 1984, it has

9 always been run principally, and in control of

10 Mr. Cummings, is that true?

11 A That's true.

12 Q Over the years the Cummings Candy Company has

13 largely ignored corporate formalities and has been run as

14 a family business, is that true?

15 A That's true.

16 Q Were you ever notified -- excuse me. Have you

17 ever served as vice-president of the corporation and been

18 on its board of directors?

19 A Yes.

20 Q Were you ever notified by anyone of any meeting

21 at which removal of you as vice-president or as a member

22 of the board of directors was going to be discussed or

23 voted on?

24 A No.

25 Q Do you have an opinion as to what the business is

1 worth, including the land, the building, and the ongoing
2 business concern, the totality of it?

3 A I think, including all of those things, about a
4 million and a half.

5 Q Have you ever heard Mr. Cummings state an opinion
6 as to what the building is worth?

7 A Yes.

8 Q What is his opinion?

9 A As to what the whole thing is worth?

10 Q The whole thing is worth?

11 A Well over a million, I believe, is what he has
12 said.

13 Q Is there a land lease agreement concerning the
14 payment of land lease payments to you and Mr. Cummings?

15 A Yes.

16 Q Was it originally written?

17 A Yes.

18 Q Was it for 500 a month to each of you?

19 A That's right.

20 Q And over the years, has he changed the amount by
21 oral agreement?

22 A Yes.

23 Q And what is it currently?

24 A 1500 a month.

25 Q Each?

1 A Each.

2 Q Is Mr. Cummings current to you, or is the
3 business current to you in payments to you under the land
4 lease agreement?

5 A No.

6 Q How many months behind are they?

7 A About 24 months. That's a guess.

8 Q Is Mr. Cummings current with you at the moment on
9 his alimony obligations?

10 A Yes. Not including March.

11 Q Okay. Has there ever been a family trust that
12 you know of?

13 A No.

14 Q You're aware that Mr. Cummings has alleged there
15 was a family trust created in 1984, is that correct?

16 A Yes.

17 Q Did you ever sign any family trust agreement?

18 A Not for 1984 trust.

19 Q Has there ever been -- did Mr. Cummings ever act
20 as though there was a family trust, in your experience?

21 A Not when I was with the business.

22 Q Up until two years ago?

23 A Yes.

24 Q So from 1994 up until this divorce action, he did
25 not act as though there were a trust?

1 A That's right.

2 Q Okay.

3 Your Honor, if I could have Mr. Peterson sworn,
4 I'd like to ask him a question or two.

5 THE COURT: Very well. If you would stand and be
6 sworn, Mr. Peterson.

7 STEVEN F. PETERSON,
8 called as a witness by the Plaintiff, was duly sworn
9 and testified as follows:

10 DIRECT EXAMINATION

11 BY MR. McPHIE:

12 Q Mr. Peterson, would you state your name and
13 address.

14 A Steven F. Peterson. My office address is 3191
15 South 3300 East, Suite 100, Salt Lake City, Utah 84109.

16 Q Mr. Peterson, what's your occupation?

17 A I'm a certified public accountant.

18 Q How long have you worked in that capacity?

19 A For 14 years.

20 Q And you are a private -- you're a public -- you
21 work for the public, is that true?

22 A That's true.

23 Q Okay. Mr. Peterson, have you reviewed the tax
24 returns filed, or the tax returns that I showed you for
25 C. Kay Cummings and Oletta Cummings for their personal

1 returns for 1992 and 1993?

2 A Yes, I have.

3 Q Have you also reviewed the tax returns for the
4 business known as C. Kay Cummings Candy Incorporated for
5 1992 and 1993?

6 A Yes, I have.

7 Q Have you also reviewed a document which was
8 recently -- you don't know this -- a document that I gave
9 you a few days ago in an envelope supplied by an
10 accountant, a Mr. David Posey, that is an accounting
11 concerning monies paid out from C. Kay Cummings Candy
12 Incorporated to Mr. Cummings since 1992?

13 A Yes, I have.

14 Q Have you been requested by me to give an opinion
15 as to how much money Mr. Cummings could take from the
16 business, C. Kay Cummings Candy, Inc. as income without
17 putting the business in jeopardy, annually?

18 A Yes, I have.

19 Q In connection with being asked by me to form an
20 opinion as to that, have you had explained to you the Utah
21 Code section regarding computation of gross income for
22 support purposes?

23 A Yes. You explained it to me and also gave me a
24 copy of it.

25 Q And you understand that gross income for support

1 purposes may not be exactly the same as gross income for
2 IRS or tax purposes?

3 A Yes.

4 Q In forming your opinion as to how much money
5 Mr. Cummings could take from that business, have you done
6 so with the idea in mind that it must be done without
7 putting the business in jeopardy, leaving sufficient cash
8 in the business to meet expected and some unexpected cash
9 needs for the business each year?

10 A Yes, I have.

11 Q Have you ever met Mr. Cummings before?

12 A Not before this morning.

13 Q Have you ever met Mrs. Cummings before?

14 A Not before this morning.

15 Q Are you related to either of them in any way that
16 you know of?

17 A No.

18 Q Have you formed an opinion as to how much money
19 Mr. Cummings could take out of the business annually
20 without putting the business in jeopardy?

21 A I have.

22 Q What is your opinion?

23 A Based on the records which have been supplied me,
24 it appears that Mr. Cummings could take approximately
25 \$160,000 out of the business, in addition to the land

1 lease payment. This figure would include all building
2 rentals, wages, dividends, personal expenses, things of
3 that nature.

4 Q Would that leave sufficient monies in the
5 business to meet the obligations that it has been meeting
6 in the past?

7 A According to the returns that I have reviewed,
8 yes, it would.

9 Q Did you note on the corporate tax return filed
10 for C. Kay Cummings Candy Incorporated in 1993 that the
11 business has retained earnings that the parties have paid
12 personal income tax on?

13 A Yes.

14 Q Do you know without looking at your records --
15 you my need to look at your records -- how much money was
16 retained by C. Kay Cummings Candy Inc. in 1993 in tax but
17 retained earnings to the parties?

18 A I would have to look at the return, which I do
19 have in my briefcase.

20 Q Let me ask you if the figure \$288,946 rings a
21 bell?

22 A That sounds approximately correct, yes.

23 Q Okay.

24 OLETTA CUMMINGS,

25 resumed the witness stand and testified as follows:

1 DIRECT EXAMINATION

2 BY MR. McPHIE:

3 Mrs. Cummings, let me ask you one other question.
4 Why do you want to be divorced from Mr. Cummings?
5 Briefly.

6 A Briefly, he is controlling, manipulative,
7 sometimes violent and --

8 THE COURT: You have attempted to reconcile your
9 differences, have you not, in the past?

10 THE WITNESS: Many times.

11 THE COURT: You find continuation of the marriage
12 impossible, is that correct?

13 THE WITNESS: Yes.

14 THE COURT: Very well.

15 Q (By Mr. McPhie) You have been separated
16 continuously since July of 1992, have you not?

17 A That's correct.

18 MR. McPHIE: Your Honor, we'd submit it. I
19 have -- I'd like to proffer that I have had some
20 additional fees since the court last awarded temporary
21 fees, and I have an affidavit in support of that. I have
22 also prepared Findings of Fact, Conclusions of Law and
23 Decree of Divorce consistent with the testimony here. I
24 have prepared them all stating that Mrs. Cummings,
25 appeared, Mr. Peterson appeared. Neither the defendant

1 nor his counsel appeared, not anticipating that they
2 would. With the court's permission, that's an issue
3 correction. I can have these hand delivered to you later
4 today or tomorrow.

5 THE COURT: The court finds jurisdiction and
6 grounds in this matter and will grant the divorce. I
7 expect that the findings and conclusions and the decree be
8 consistent with the testimony and supported by documents
9 in the file, and reflect who also was present here today.

10 MR. McPHIE: I'd ask if I could move that.

11 MR. SPAFFORD: May I make three requests:

12 No. 1 is that counsel for Mr. Cummings receive a
13 copy of the Findings of Fact and Decree.

14 THE COURT: Of course.

15 MR. SPAFFORD: No. 2. That the court grant a
16 stay of any execution or leave until such time as we have
17 had an opportunity to review them pending either appeal or
18 a motion. And, No. 3, that the court, in rendering a
19 decision, that you fairly consider Mr. Posey's report.
20 Mr. Posey, you will recall, was appointed by the court,
21 not by us.

22 THE COURT: And I will. It's not going to be a
23 formal stay of a receipt of the findings and conclusions.
24 You will have, obviously, the statutory period then for my
25 basis. I will hold it for ten days.

1 MR. McPHIE: Let me also move the deposition of
2 Mr. Cummings, which was taken over a period of three
3 separate days -- but the record, in the three separate
4 volumes be published. I think that needs to be published,
5 in connection with these proceedings and so on.

6 THE COURT: So what will happen on this,
7 Mrs. Cummings, as soon as I receive the documents that
8 have been referenced here, and upon my approval of them,
9 then, I will sign them and they will remain part of the
10 file. And Mr. Spafford, as I indicated, will have ten
11 days as to any specific requests, and I don't know if
12 you're asking me to execute on anything or attach
13 anything, I don't know. And then whatever statutory
14 period he wishes to take regarding appeal, that's his
15 decision.

16 MR. McPHIE: Is the stay for ten days until after
17 they have had --

18 THE COURT: Just review the documents, that's
19 all.

20 MR. McPHIE: Okay.

21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

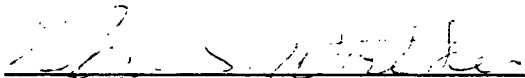
REPORTER'S CERTIFICATE

STATE OF UTAH)
 : SS.
County of Salt Lake)

I, Nora S. Worthen, do certify that I am a
Certified Shorthand Reporter and Official Court Reporter
in and for the State of Utah; that as such reporter, I
reported the occasion of the proceedings of the
above-entitled matter at the aforesaid time and place.
That the proceeding was reported by me in stenotype using
computer-aided transcription consisting of pages 3 through
14 inclusive. That the same constitutes a true and
correct transcription of the default divorce hearing of
said proceedings.

That I am not of kin or otherwise associated with
any of the parties herein or their counsel, and that I am
not interested in the events thereof.

WITNESS my hand at Salt Lake City, Utah, this
17th day of November, 1995.



Nora S. Worthen, RPR
Utah License No. 22-106373-7801

ADDENDUM "C"

COURT-APPOINTED EXPERT'S VALUATION REPORT

C. KAY CUMMINGS CANDIES, INC.

ANALYSIS OF INCOME AND OTHER
BENEFITS RECEIVED BY

C. KAY CUMMINGS
OLETTA CUMMINGS

SEPTEMBER 1, 1992 THROUGH DECEMBER 31, 1994

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	3
PROCEDURES PERFORMED	3-5
DISCUSSION OF S CORPORATION ACCOUNTING AND TAX CONCEPTS	6
DISCUSSION OF ALLOCATION OF OWNER DRAWS	7
EXHIBIT A: SUMMARY OF INCOME AND OTHER BENEFITS RECEIVED BY C. KAY AND OLETTA CUMMINGS	8
SUPPORTING SCHEDULES:	
EXHIBIT B: SCHEDULE OF OWNER'S SALARIES AND WAGES	9
EXHIBIT C: SCHEDULE OF DRAWS BY OWNERS	10-15
EXHIBIT D: SCHEDULE OF FAMILY TRUST DISBURSEMENTS PAID BY TRUST AND COMPANY	16-17
EXHIBIT E: SCHEDULE OF FACTORY RENT PAYMENTS TO OWNERS	18
EXHIBIT F: SCHEDULE OF COMPANY AUTOMOBILE USAGE BY OWNERS	19-22
EXHIBIT G: SCHEDULE OF IN-TOWN MEAL EXPENSE INCURRED BY OWNERS	23
EXHIBIT H: SCHEDULE OF CREDIT CARD PURCHASES REIMBURSED BY COMPANY	24-34
EXHIBIT I: SCHEDULE OF CASH PURCHASES REIMBURSED BY COMPANY	35-37
EXHIBIT J: SCHEDULE OF OWNERS MISCELLANEOUS PERSONAL EXPENSES PAID BY COMPANY	38
EXHIBIT K: SCHEDULE OF ALLOCATION OF INCOME TAXES TO OWNERS	39
EXHIBIT L-1: ACTUAL TAX COMPUTATIONS - CALENDAR 1992	40
L-2: ACTUAL TAX COMPUTATIONS - CALENDAR 1993	41-42



CERTIFIED PUBLIC ACCOUNTANTS

ROGER B. PINNOCK, CPA
RONALD D. ROBBINS, CPA
DAVID T. POSEY, CPA
ROGER O. RICHINS, CPA

January 12, 1995

Judge Glenn Iwasaki
Third Judicial District Court
240 East 400 South
Salt Lake City, UT 84111

Re: Cummings vs. Cummings

INTRODUCTION

As requested by Mrs. Oletta Cummings in October of 1993 and then later by Mr. C. Kay Cummings in November of 1994, we (Pinnock, Robbins, Posey & Richins; hereafter referred to as PRP&R) have performed the procedures enumerated below with respect to the income and other benefits received by C. Kay and Oletta Cummings from C. Kay Cummings Candies, Inc. (the Company). The findings of our procedures have been summarized in the schedules that follow. Our procedures and summary were conducted and prepared to assist C. Kay and Oletta Cummings, together with their legal advisors, to quantify the amount of income and other benefits received by C. Kay and Oletta Cummings during the period from September 1, 1992 to December 31, 1994. Our report is not intended to be used for any other purpose.

We have also prepared a brief discussion of some of the accounting and tax concepts of Subchapter S Corporations, particularly in the area of Owners' capital.

PROCEDURES PERFORMED

PRP&R met with the general accountant of the business, Rick Bradshaw, on December 23, 1994 to discuss the procedures to be performed and to obtain the necessary accounting records and supporting documentation.

From a review of the accounting records of the Company, ie. the general ledger and accounts payable disbursement ledger, and per discussions and inquiries with Rick Bradshaw, C. Kay Cummings and Oletta Cummings, PRP&R identified the potential areas in which the owners could obtain income and other benefits from the Company. The areas identified are the following:

1. Salaries and wages
2. Owner draws
3. Factory rent (lease payments)
4. Personal use of company assets
5. Expense reimbursements

The following is a description of the work performed in each of these areas identified for the period covered by the report.

- . Salaries and Wages - Salaries and wages represent compensation for time spent working for the Company. The amounts reported to the IRS and to the owners on W-2's were agreed to the Company's accounting records. A sample of payroll disbursements to the owners as recorded in the general ledger were agreed as to the payee's name, date of disbursement and the amount of disbursement to the canceled payroll checks. In addition, a summary of salaries and wages paid to the owners for the period was prepared. (See Exhibit B)
- . Owner Draws - Owner draws are dividend distributions of cash from the owners capital accounts. All transactions relating to owner capital accounts as recorded in the general ledger for the period were summarized. Each transaction was categorized as to the nature of the distribution and allocated to the owners based upon discussion with company personnel and/or a review of supporting documentation (canceled checks, invoices, receipts, etc.). (See Exhibit C)
- . Factory Rent (Lease Payments) - Factory rent represents lease payments made by the Company for the use of the land upon which the current manufacturing, shipping and retail facilities are located. All transactions relating to the factory rent account per the general ledger were summarized for the period. A sample of factory rent disbursements to the owners as recorded in the general ledger were agreed as to the payee's name, date of disbursement and the amount of disbursement to the canceled factory rent checks. (See Exhibit E)
- . Expense Reimbursements - Expense reimbursements result from the owners submitting receipts to the Company for reimbursement of expenses that they have incurred. The expense reimbursements were summarized as to the nature of the transaction, ie. (credit card purchase or cash purchase).

All receipts were reviewed in detail. Receipts that were clearly identifiable as being 100% business were not summarized. All other receipts that were either part business or entirely personal were summarized and categorized. This included expenditures for meals, gasoline and miscellaneous personal purchases. The determination as to whether a purchase was 100% business or not was based on a review of supporting documentation and inquiry of Company personnel.

An allocation of meals and vehicle expenses paid to the owners that were not 100% business, was made based upon establishing a pattern of identifiable business meals and business automobile use, and then treating the difference as owners' personal expenses by subtracting the total costs of these items from the identifiable business portion.

Expense reimbursements were tested for completeness by reviewing check copies of every check cut to the owners that were posted to the general ledger for the period.

- . Personal Use of Company Assets - Personal use of Company assets relates to owners personal use of items that are owned or leased by the Company (buildings, automobiles, office equipment, etc.). Per inquiry of Company personnel, it was determined that owners had obtained personal benefit from the use of Company facilities as a temporary residence and from the use of Company vehicles for personal transportation. No other significant personal use of Company assets was noted.

The owners' personal use of Company facilities as a temporary residence for the period was not quantified due to not finding any significant additional expenses incurred by the Company as a result of the personal use.

In addition to performing the above procedures PRP&R reviewed the entire general ledger and inquired of the general accountant, Rick Bradshaw, as to whether there were any other transactions between the business and the owners. Per our review and inquiry, no other transactions were noted.

DISCUSSION OF S CORPORATION ACCOUNTING AND TAX CONCEPTS

Cummings Candies, Inc. has elected Subchapter S status under the Internal Revenue Code. This election has been in place since 1987. An S Corporation is primarily a tax reporting entity, not a tax paying entity. For income tax purposes the corporation is treated as a conduit. The Subchapter S provisions allows Cummings Candies, Inc. to eliminate double taxation on dividends and similar distributions to the owners. All taxable income of the corporation, is not taxed at the corporate level, but is passed through and taxed to the shareholders, whether or not there has been any cash distributions to them. Corporate taxable income is reported to the shareholders pro-rata to their stock ownership. Since 1987 50% of the income has been reported to Mr. Cummings and 50% has been reported to Mrs. Cummings.

Actual dividend distributions of cash to the owners are not taxed, since all corporate income has previously been taxed on the owners' joint tax return. Cash dividend distributions to the owners simply reduce the capital that has been retained from the earnings of the business. In summary; as the business has earnings, it is added to corporate retained earnings, and taxed on the owners' personal tax return. As the business distributes cash dividends to the owners, the capital account decreases accordingly.

The "retained earnings" does not necessarily represent cash. Retained earning is an accounting of how much net income has been retained in the business. It is usually part cash, part accounts receivable, part inventory, and part property and equipment.

Salaries and wages are not dividends. They are payments for the services of the owner or employee, and are recorded like any other expense of the business, which reduces the net income of the business in the accounting period they are paid. Salaries and wages are reported to the recipient on Form W-2 and taxed on the individual's personal tax return.

Dividends are not an "expense" of doing business, but simply a distribution (reduction of) retained capital.

To see how the above concepts have been applied in 1992 and 1993 see Exhibits L-1 and L-2.

DISCUSSION OF ALLOCATION OF OWNER DRAWS - EXHIBIT C

The Schedule of Owner Draws at Exhibit C reports all owner capital distributions for the period starting September, 1992 to December 31, 1994. We have attempted to make some preliminary allocation of those draws into the following categories:

1. Draws that appear to be 100% C Kay's
2. Draws that appear to be 100% Oletta's
3. Draws that need to be allocated by the court.

We have made a preliminary allocation of the category three draws. This was done merely to show both opposing parties how the schedule totals and the conclusions that can be derived from the exhibit once a final allocation is either agreed upon by both parties, or ruled upon by the court.

The category three draws are allocated in a 50%/50% ratio except for charitable contributions, income taxes and family trust disbursements. Owner draws allocated 50%/50% are those in which, by the nature of the draws, the owners received mutual (relatively equal) benefit from them. These draws include expenditures to maintain the jointly owned Herbert Avenue home, support to their children, the prepayment of burial expenses for both parties and the repayment of a jointly signed commercial note.

The charitable contributions are allocated 100% to C. Kay. Though 50% of these contributions were based on the net income attributed to Oletta for the period, C. Kay voluntarily made these contributions from the owners' capital accounts for Oletta without her concurrence.

The income taxes are allocated based on a percentage of income and other benefits received for the period (excluding salaries and wages). Salaries and wages represent compensation for being an employee and are based on actual time spent working for the Company where all other income and benefits are determined from being owners of the Company. Thus, salaries and wages are excluded from the computation to allocate income taxes. (See Exhibit K)

The family trust disbursements are allocated based on who benefitted from the expenditure. Expenses that created a direct benefit were allocated 100% to the beneficiary where expenses that created an indirect benefit were allocated 50%/50%.

C. KAY CUMMINGS CANDIES, INC.

SUMMARY OF INCOME AND OTHER BENEFITS RECEIVED BY
C. KAY AND OLETTA CUMMINGS

FOR THE PERIOD SEPTEMBER 1, 1992 THROUGH DECEMBER 31, 1994

<u>Reference</u>	<u>Description</u>	<u>C. Kay</u>	<u>Oletta</u>	<u>Total</u>
Exhibit B	Salaries and wages	\$ 60,000.00	\$ 2,682.67	\$ 62,682.67
Exhibit C	Owner draws	134,635.87	75,865.30	210,501.17
Exhibit E	Factory rent payments	30,100.00	35,300.00	65,400.00
Exhibit F	Company automobile use	8,884.89	-	8,884.89
	Expense reimbursements:			
Exhibit G	Personal meal expense	2,930.57	-	2,930.57
Exhibit J	Personal miscellaneous expense	<u>11,437.79</u>	<u>-</u>	<u>11,437.79</u>
TOTAL INCOME AND OTHER BENEFITS RECEIVED BY OWNERS		<u>\$247,989.12</u>	<u>\$113,847.97</u>	<u>\$361,837.09</u>

See description of procedures performed.

C. KAY CUMMINGS CANDIES, INC.

SCHEDULE OF OWNER'S SALARIES AND WAGES

FOR THE PERIOD SEPTEMBER 1, 1992 THROUGH DECEMBER 31, 1994

<u>Period</u>	<u>C. Kay</u>	<u>Oletta</u>	<u>Total</u>
September 1, 1992 through December 31, 1992	\$ 8,000.00	\$ 773.67	\$ 8,773.67
January 1, 1993 through December 31, 1993	26,000.00	1,909.00	27,909.00
January 1, 1994 through December 31, 1994	<u>26,000.00</u>	<u>-</u>	<u>26,000.00</u>
TOTAL SALARIES AND WAGES PAID TO OWNERS	<u>\$60,000.00</u>	<u>\$2,682.67</u>	<u>\$62,682.67</u>

See description of procedures performed.

Exhibit C

C. Kay Cummings Candies, Inc
Schedule of Draws By Owners
For the Period September 1, 1992 Through Dec

Date	Payee	Herbert Ave
		Home
9/1/92	West One Bank	250 00
9/1/92	LDS Church	
9/1/92	BYU Housing	
9/4/92	Public Utilities	46 87
9/12/92	Utah Valley Tire	
9/14/92	Utah Power & Light	89 26
9/15/92	Mt Fuel	18 29
9/15/92	IRS	
9/30/92	Dr Victor Cline	
10/1/92	West One Bank	250 00
10/1/92	LDS Church	
10/1/92	BYU Housing	
10/6/92	West One Bank	288 65
10/6/92	Public Utilities	46 36
10/14/92	Mountain Fuel	27 39
10/15/92	Utah Power & Light	55 43
11/1/92	BYU Housing	
11/1/92	SL County Assessor	1 291 01
11/4/92	Public Utilities	32 74
11/10/92	BYU	
11/12/92	Utah Power & Light	67 86
11/12/92	Mountain Fuel	94 01
11/16/92	LDS Church	
11/21/92	Discriminator	
11/28/92	LDS Church	
11/30/92	Newspaper Agency	
11/30/92	Tune-A-Medix	
12/1/92	BYU Housing	
12/1/92	Sons Of Utah Pioneers	
12/4/92	Public Utilities	26 80
12/15/92	Mt Fuel	199 24
12/16/92	Utah Power & Light	88 60
12/31/92	IRS	
12/31/92	Tune-A-Medix	
1/1/93	BYU Housing	
1/1/93	LDS Church	
1/3/93	Public Utilities	26 80
1/15/93	Mt Fuel	231 65

See Description of Procedures Performed

Date	Payee	Draws Subject To Allocation				
		Herbert Ave	Paid to	Charity	Mortuary &	Income
		Home	Children	Contrib	Cemetery	Taxes
1/17/93	LDS Church			50 00		
1/20/93	Utah Power & Light	111 50				
1/26/93	Newspaper Agency					
1/29/93	IRS					477 00
2/1/93	BYU Housing		223 00			
2/2/93	LDS Church			1 150 00		
2/2/93	Public Utilities	26 80				
2/16/93	Mt Fuel	181 02				
2/18/93	State Tax Commission					2 223 00
2/18/93	Utah Power & Light	79 32				
3/1/93	BYU Housing		223 00			
3/1/93	LDS Church			1 150 00		
3/8/93	Public Utilities	30 36				
3/15/93	Utah Power & Light	52 96				
3/17/93	Mt Fuel	158 27				
3/23/93	Newspaper Agency					
3/26/93	New Yorker Magazine					
4/1/93	BYU Housing		222 00			
4/1/93	LDS Church			1 150 00		
4/6/93	Public Utilities	25 90				
4/14/93	Utah Power & Light	64 50				
4/15/93	IRS					3 000 00
4/16/93	Mt Fuel	90 15				
5/1/93	BYU Housing		89 00			
5/1/93	BYU Tickets Office					
5/1/93	LDS Church			1 150 00		
5/6/93	Public Utilities	31 82				
5/14/93	Utah Power & Light	80 59				
5/30/93	Newspaper Agency					
6/1/93	BYU Housing		89 00			
6/1/93	LDS Church			1 150 00		
6/1/93	Farmers Insurance	319 00				
6/3/93	Public Utilities	38 22				
6/16/93	Utah Power & Light	89 71				
6/30/93	IRS					3 000 00
7/1/93	BYU Housing		89 00			
7/1/93	LDS Church			1 150 00		
7/1/93	SL County Assessor					

See Description of Procedures Performed

[illegible]

Exhibit C

C. Kay Cummings Candies, Inc.
Schedule of Draws By Owners
For the Period September 1, 1992 Through Dec

		Herbert Ave.
Date	Payee	Home
7/1/93	State Tax Commission	
7/7/93	Public Utilities	51 66
7/13/93	Newspaper Agency	
7/16/93	Mt Fuel	18 12
7/16/93	BYU	
7/19/93	Utah Power & Light	92 79
7/30/93	Bank One (Loan Pymt)	
8/1/93	BYU Housing	
8/1/93	LDS Church	
8/4/93	Public Utilities	44 54
8/10/93	BYU Insurance	
8/16/93	Cummings Family Trust	
8/17/93	Mt Fuel	18 84
8/17/93	Utah Power & Light	91 28
9/1/93	BYU Housing	
9/1/93	Cummings Family Trust	
9/1/93	Cummings Family Trust	
9/1/93	LDS Church	
9/7/93	Public Utilities	41 64
9/7/93	Newspaper Agency	
9/9/93	Grants Printing	
9/15/93	IRS	
9/16/93	Mt Fuel	16 82
9/16/93	Utah Power & Light	83 05
10/1/93	Zion's Bank	
10/1/93	LDS Church	
10/14/93	Cummings Family Trust	
10/15/93	State Tax Commission	
10/15/93	IRS	
10/16/93	Cummings Family Trust	
10/28/93	Affiliated Insurance (Chris)	
10/29/93	Bank One (Loan Pymt)	
11/1/93	Zion's Bank	
11/1/93	SL Co Treasurer	1,307 27
11/1/93	LDS Church	
11/10/93	Nathan Cummings	
11/12/93	Bank One (Loan Pymt)	
11/15/93	American Express (Airfare)	

See Description of Procedures Performed

		Draws Subject To Allocation				
Date	Payee	Herbert Ave. Home	Paid to Children	Charity Contrib.	Mortuary & Cemetery	Income Taxes
11/18/93	Grants Printing					
11/19/93	Larkin Mortuary				500 00	
12/1/93	Zion's Bank					
12/1/93	LDS Church			1 150 00		
12/1/93	LDS Church			3 000 00		
12/15/93	SL Co Assessor					
12/28/93	Newspaper Agency					
12/31/93	Frame Gallery					
12/31/93	Mutual of Omaha (1993)					
1/1/94	BYU		1 215 00			
1/3/94	Mutual of Omaha					
1/27/94	BYU Insurance		115 00			
1/27/94	Larkin Mortuary				500 00	
1/31/94	LDS Church			2,500 00		
2/1/94	Son of Utah Pioneers					
2/1/94	BYU Housing		210 00			
2/3/94	Mutual of Omaha					
2/22/94	Newspaper Agency					
3/1/94	Larkin Mortuary				500 00	
3/1/94	Wasatch Lawn				500 00	
3/1/94	Ron Davey					
3/3/94	Mutual of Omaha					
3/7/94	LDS Church			1,150 00		
3/9/94	LDS Church			1,350 00		
4/1/94	Larkin Mortuary				500 00	
4/1/94	Wasatch Lawn				500 00	
4/3/94	Mutual of Omaha					
4/6/94	Readers Digest					
4/14/94	LDS Church			4,000 00		
4/14/94	National Geographics					
4/15/94	Chris Cummings		732 00			
4/15/94	IRS					33,420 00
4/15/94	State Tax Commission					9,153 00
4/29/94	Chris Cummings		390 03			
5/3/94	Mutual of Omaha					
5/11/94	Ron Davey					
5/17/94	Mt Fuel	58 54				
6/1/94	LDS Church			1,350 00		

See Description of Procedures Performed

Family Trust	100% Kay's Draws			Kay's Total	100% Oletta's Draws					Oletta's Total
	Kay's Medical	Kay's Misc.	Kay's Subscrip.		Oletta's Medical	Oletta's Attorney	Oletta's Auto	Oletta's Alimony	Oletta's Misc.	
29 00										
							473 32			473 32
							50 00			50 00
			16 48	16 48						
									488 60	488 60
					2 318 91					2 318 91
					345 81					345 81
		15 00		15 00						
					345 81					345 81
			16 48	16 48						
300 00					347 76					347 76
					347 76					347 76
			67 92	67 92						
			39 00	39 00						
					347 76					347 76
300 00										

Exhibit C

C. Kay Cummings Candies, Inc.
Schedule of Draws By Owners
For the Period September 1, 1992 Through Dec

Date	Payee	Herbert Ave Home
6/3/94	Mutual of Omaha	
7/3/94	Mutual of Omaha	
7/5/94	William Christensen	
7/6/94	Cummings Family Trust	
7/8/94	Ron Davey	
7/11/94	Newspaper Agency	
7/22/94	LDS Church	
7/29/94	Larkin Mortuary	
8/1/94	LDS Church	
8/3/94	Mutual of Omaha	
8/4/94	IRS	
8/4/94	BYU	
8/12/94	Larkin Mortuary	
8/30/94	IRS	
8/31/94	Marjorie Hatch	
9/1/94	Dave Kirby	
9/3/94	Mutual of Omaha	
9/13/94	IRS	
10/1/94	Marjorie Hatch	
10/1/94	LDS Church	
10/3/94	Mutual of Omaha	
10/14/94	Ron Davey	
10/17/94	IRS	
10/17/94	State Tax Commission	
10/24/94	State Tax Commission	
10/27/94	U of U	
10/28/94	Intermountain Cardiology	
11/3/94	Mutual of Omaha	
11/7/94	David McFee	
11/23/94	Oiletta Cummings	
12/1/94	LDS Church	
12/1/94	Marjorie Hatch	
12/3/94	Mutual of Omaha	
12/8/94	Ron Davey	
12/13/94	Clyde K Cummings	
12/15/94	Chrs Cummings	
12/15/94	Blue Cross Blue Shield	
12/17/94	Cummings Family Trust	

		Draws Subject To Allocation				
Date	Payee	Herbert Ave Home	Paid to Children	Charity Contrib	Mortuary & Cemetery	Income Taxes
12/20/94	Cummings Family Trust					
12/28/94	LDS Church			2 000 00		
Totals Before Allocation		\$ 6 335 63	\$ 11 704 03	\$ 43 600 00	\$ 3 553 00	\$ 93 958 00
Allocations						
Total Draws 100% to Owners						
Allocation of Joint Draws (50/50)						
Herbert Ave Home		(6 335 63)				
Paid to Children			(11 704 03)			
Mortuary and Cemetery					(3 553 00)	
Commercial Note						
Allocation of Family Trust Draws						
(see Exhibit D)						
Allocation of Charitable						
Contributions				(43 600 00)		
Subtotal of Owner Draws Allocated						
Excluding Income Taxes						
Allocation of Income Taxes						
(see Exhibit K)						(93 958 00)
Totals After Allocation		\$ -	\$ -	\$ -	\$ -	\$ -

See Description of Procedures Performed

See Description of Procedures Performed

Family Trust	100% Kay's Draws			Kay's Total	100% Oletta's Draws					Oletta's Total
	Kay's Medical	Kay's Misc	Kay's Subscrip		Oletta's Medical	Oletta's Attorney	Oletta's Auto	Oletta's Alimony	Oletta's Misc	
2 000 00										
\$ 18 806 83	\$ 2 220 50	\$ 4 982 00	\$ 444 56	\$ 7 647 06	\$ 6 649 68	\$ 481 00	\$ 2 519 06	\$ 11 431 00	\$ 903 60	\$ 21 984 34
				7 647 06						21 984 34
				3 167 82						3 167 82
				5 852 02						5 852 02
				1 776 50						1 776 50
				1 456 14						1 456 14
(18 806 83)				9 196 71						9 610 12
				43 600 00						
				72 696 24						43 846 93
				61 939 63						32 018 37
\$				\$ 134 635 87						\$ 75 865 30

C. KAY CUMMINGS CANDIES, INC.SCHEDULE OF FAMILY TRUST DISBURSEMENTS PAID BY TRUST AND COMPANYFOR THE PERIOD SEPTEMBER 1, 1992 THROUGH DECEMBER 31, 1994

RECONCILIATION OF DISBURSEMENTS AND OWNER DRAWS:

	<u>C. Kay</u>	<u>Oletta</u>	<u>Total</u>
Allocation of trust checking account disbursements	\$6,750.00	\$7,163.41	\$13,913.41
Allocation of business checking account disbursements	<u>2,234.21</u>	<u>2,234.21</u>	<u>4,468.42</u>
Total disbursements	8,984.21	9,397.62	18,381.83
Distribution of balance in trust checking account	<u>212.50</u>	<u>212.50</u>	<u>425.00</u>
TOTAL AMOUNTS ALLOCATED TO OWNER DRAWS (SEE EXHIBIT C)	<u>\$9,196.71</u>	<u>\$9,610.12</u>	<u>\$18,806.83</u>

See description of procedures performed.

C. KAY CUMMINGS CANDIES, INC.SCHEDULE OF FACTORY RENT PAYMENTS TO OWNERSFOR THE PERIOD SEPTEMBER 1, 1992 THROUGH DECEMBER 31, 1994

<u>Date</u>	<u>Check No.</u>	<u>C. Kay</u>	<u>Oleta</u>
09/03/92	Counter check	\$ -	\$ 750.00
09/09/92	10309	-	750.00
09/16/92	10338	-	750.00
11/06/92	10533	-	750.00
11/16/92	10586	750.00	-
12/04/92	10649	-	750.00
12/04/92	10650	750.00	-
12/31/92	10774	5,250.00	-
01/22/93	10865	-	750.00
01/22/93	10866	750.00	-
03/26/93	11162	-	1,000.00
04/09/93	11221	-	1,000.00
04/30/93	11297	-	1,000.00
05/28/93	11413	-	1,000.00
07/01/93	11566	-	1,000.00
07/29/93	11692	-	1,000.00
08/27/93	11790	-	1,000.00
10/04/93	11936	-	1,700.00
11/02/93	12059	-	1,700.00
12/03/93	12212	-	1,700.00
01/06/94	12333	-	1,700.00
01/06/94	12334	9,000.00	-
02/02/94	12463	-	1,700.00
02/25/94	12560	-	1,700.00
04/08/94	12740	-	1,700.00
05/12/94	12859	-	1,700.00
06/03/94	12960	-	1,700.00
07/06/94	13038	-	1,700.00
07/29/94	13139	6,800.00	-
08/04/94	13170	-	1,700.00
08/30/94	13246	-	1,700.00
09/02/94	13270	6,800.00	-
10/10/94	13413	-	1,700.00
11/04/94	13528	-	1,700.00
TOTAL FACTORY RENT PAYMENTS		<u>\$30,100.00</u>	<u>\$35,300.00</u>

See description of procedures performed.

C. KAY CUMMINGS CANDIES, INC.SCHEDULE OF COMPANY AUTOMOBILE USAGE BY OWNERSFOR THE PERIOD SEPTEMBER 1, 1992 THROUGH DECEMBER 31, 1994

FEDERAL MILEAGE ALLOWANCE METHOD:

Automobile usage in terms of standard mileage rate;

<u>Year</u>	<u>Automobile</u>	<u>Total Miles for Period</u>	<u>Business Miles</u>	<u>Personal Miles</u>	<u>Mileage Rate</u>	<u>Value of Personal Use</u>
1992	1988 Dodge	7,460.00	3,087.56	4,372.44	0.28	\$1,224.28
1993	1988 Dodge	22,380.00	7,616.00	14,764.00	0.28	4,133.92
1994	1988 Dodge	7,460.00	1,491.50	5,968.50	0.29	1,730.87
1994	1994 Dodge	10,667.00	4,474.50	6,192.50	0.29	<u>1,795.82</u>
TOTAL AUTOMOBILE COST ATTRIBUTED TO C. KAY						<u>\$8,884.89</u>

ACTUAL COST METHOD (TO TEST OF REASONABLENESS OF THE FEDERAL MILEAGE ALLOWANCE METHOD):

Automobile Usage as a percent of depreciation and actual expenses;

<u>Year</u>	<u>Automobile</u>	<u>Actual Cost</u>	<u>Depreciation For Period</u>	<u>Percent of Personal Use</u>	<u>Value of Personal Use</u>
1992	1988 Dodge	\$21,410.81	\$1,070.54	0.5537	\$ 592.74
1993	1988 Dodge	21,410.81	4,282.16	0.5537	2,370.97
1994	1988 Dodge	21,410.81	1,070.54	0.5537	592.74
1994	1994 Dodge	25,931.67	3,889.75	0.5537	<u>2,153.70</u>
Depreciation					5,710.15
Gasoline purchased					1,057.37
Implied other operating costs					<u>2,117.37</u>
TOTAL AUTOMOBILE COST ATTRIBUTED TO C. KAY					<u>\$8,884.89</u>

See description of procedures performed.

C. KAY CUMMINGS CANDIES, INC.

SCHEDULE OF AUTOMOBILE USAGE BY OWNERS

FOR THE PERIOD SEPTEMBER 1, 1992 THROUGH DECEMBER 31, 1994

ASSUMPTIONS USED FOR CALCULATIONS:

General:

1. A 1988 Dodge van was used during the applicable period (September 1, 1992 through December 31, 1994) for four months of 1992, twelve months of 1993 and four months of 1994. A 1994 Dodge van was purchased on April 30, 1994 and was used for eight months of 1994.
2. The business use of vehicles is an estimate based on gaining an understanding of Mr. Cumming's business activities and business trips as per inquiry of Company personnel and per review of business documentation. All non-business use of vehicles is allocated to Mr. Cummings as personal use.

The following pattern of business activities were summarized in terms of frequency per week:

<u>Identifiable Weekly Pattern of Business Miles</u>			
<u>Activity</u>	<u>Trips/Week</u>	<u>Miles/Trip</u>	<u>Miles/Week</u>
Trips to the post office	2.00	5.00	10.00
Trips to the bank	5.00	3.00	15.00
Trips to purchase supplies	2.00	16.50	33.00
Deliveries of product	1.00	25.00	<u>25.00</u>
TOTAL IDENTIFIABLE WEEKLY PATTERN OF BUSINESS MILES			<u>83.00</u>

The following specific out-of-town business trips were identified during the applicable period:

<u>Actual Out-of-Town Business Trip Miles for the Period</u>				
<u>Year</u>	<u>Destination</u>	<u>Avg. Miles</u>	<u>Number of Trips</u>	<u>Miles/Year</u>
1992	California (San Diego & Los Angeles)	1,650.00	1.00	1,650.00
1993	California (San Diego & Los Angeles)	1,650.00	2.00	3,300.00
1994	California (San Diego & Los Angeles)	1,650.00	1.00	<u>1,650.00</u>
TOTAL ACTUAL OUT-OF-TOWN BUSINESS TRIP MILES FOR THE PERIOD				<u>6,600.00</u>

See description of procedures performed.

C. KAY CUMMINGS CANDIES, INC.SCHEDULE OF AUTOMOBILE USAGE BY OWNERSFOR THE PERIOD SEPTEMBER 1, 1992 THROUGH DECEMBER 31, 1994

Summary of business mileage by year for the period.

Year	Weekly Patter of Business Mileage			Specific Business Trips	Total Business
	Miles/Week	Weeks/Year	Total	Miles/Year	Miles/Year
1992	83	17.32	1,437.56	1,650.00	3,087.56
1993	83	52.00	4,316.00	3,300.00	7,616.00
1994	83	52.00	4,316.00	1,650.00	5,966.00

Calculation of the Percentage of Personal Use of Company Vehicles:

A. Federal Mileage Allowance Method

1. The total miles driven for the 1988 Dodge van for the applicable period (September 1, 1992 through December 31, 1994) is based on averaging the total miles driven on the van (136,158) from March 31, 1998 through April 30, 1994.
2. The federal mileage allowances for the applicable years are 28 cents per mile for 1992 and 1993 and 29 cents per mile for 1994. The mileage allowance is designed to cover all operating costs (depreciation, gasoline, insurance, taxes, maintenance, repairs, etc.) of using an automobile.

B. Actual Cost Method (Test of Reasonableness of Federal Mileage Allowance)

1. The depreciation method is straight-line with a class life of five years.
2. The allocation of C. Kay's personal use for the period is based on the inverse of the business percentage of miles driven on the 1994 van since May 1, 1994 through December 31, 1994. This percent of personal use is applied to the whole period (September 1, 1992 through December 31, 1994). The calculation of the personal use percentage is as follows:

PATTERN OF BUSINESS USE:

Average miles/week	83.00
Applicable weeks (May, 1994 - December, 1994)	<u>34.64</u>

TOTAL PATTERN OF BUSINESS USE MILES

2,875.12

SPECIFIC BUSINESS TRIPS:

Total business trip miles	6,600.00
Weeks in period (September, 1992 - December, 1994)	<u>121.24</u>
Average business trip miles/week	54.44
Applicable weeks (May, 1994 - December, 1994)	<u>34.64</u>

TOTAL SPECIFIC BUSINESS TRIP MILES

1,885.71

See description of procedures performed.

C. KAY CUMMINGS CANDIES, INC.SCHEDULE OF AUTOMOBILE USAGE BY OWNERSSEPTEMBER 1, 1992 THROUGH DECEMBER 31, 1994

SUMMARY: COMPUTATION OF PERCENTAGE OF BUSINESS USE VERSUS C. KAY'S PERSONAL USE:

Pattern of business use miles	2,875.12
Specific business trip miles	<u>1,885.71</u>
Total business miles	4,760.83
Total of all miles on 1994 Van (May, 1994 - December, 1994)	<u>10,667.00</u>
Percent of business use	0.4463
Percent of personal use	<u>0.5537</u>
TOTAL ALLOCATED	<u>1.0000</u>

3. The amount of gas allocate is based upon C. Kay's percentage of personal use as computed above. Calculations are as follows:

Total gasoline purchased with credit cards (see Exhibit H)	1,491.04
Total gasoline purchased with cash (see exhibit I)	<u>418.65</u>
Total gasoline purchased during the period	1,909.69
Percent of C. Kay's use	<u>0.5537</u>
GASOLINE COSTS OF C. KAY	<u>1,057.37</u>

4. The amount allocated to other operating costs is the implied amount of expenses paid by the Company for insurance, taxes, maintenance and repairs that are attributable to C. Kay's personal use of the vehicles for the period that are built into the federal mileage allowance rate.

See description of procedures performed.

C. KAY CUMMINGS CANDIES, INC.

SCHEDULE OF IN-TOWN MEAL EXPENSES INCURRED BY OWNERS

FOR THE PERIOD SEPTEMBER 1, 1992 THROUGH DECEMBER 31, 1994

MEALS PURCHASED DURING THE PERIOD:

Total meals purchased with credit cards (see Exhibit H)	\$3,292.12	
Total meals purchased with cash (see Exhibit I)	<u>2,718.45</u>	
TOTAL MEALS PURCHASED		\$6,010.57

ALLOCATION OF MEALS TO BUSINESS AND PERSONAL EXPENSE:

Identifiable monthly business meals expense	110.00	
Number of months in period (September, 1992 - December, 1994)	x <u>28.00</u>	
TOTAL IDENTIFIABLE BUSINESS MEAL EXPENSE		<u>3,080.00</u>

DIFFERENCE - C. KAY'S PERSONAL MEAL EXPENSES		<u>\$2,930.57</u>
--	--	-------------------

ASSUMPTIONS USED FOR CALCULATIONS:

1. This schedule only includes calculations for in-town meal purchases. All out-of-town business travel meals are treated as business expenses versus an employee or owner benefit.
2. The business portion of meals expense is an estimate based on gaining an understanding of Mr. Cumming's pattern of buying meals relating to business activities as per inquiry of Company personnel and per review of business documentation.

The following pattern of business meal purchases are summarized in terms of frequency per month:

<u>Identifiable Monthly Pattern of In-Town Business Meals</u>			
<u>Activity</u>	<u>Times/Month</u>	<u>Cost/Meal</u>	<u>Cost/Month</u>
Meals with customers	1	\$40.00	\$ 40.00
Meals with office staff and management	1	25.00	25.00
Meals for overtime workers	0.5	35.00	17.50
Groceries for Company parties	1	20.00	20.00
Doughnuts for office	1	7.50	<u>7.50</u>
TOTAL IDENTIFIABLE MONTHLY PATTERN OF IN-TOWN BUSINESS MEALS			<u>\$110.00</u>

See description of procedures performed.

Exhibit H

**C. Kay Cummings Candies, Inc.
Schedule of Credit Card Purchases Reimbursed By Company
For the Period September 1, 1992 Through December 31, 1994**

Date	Card	Description	Subject To Allocation		100% KAY
			Meals	Gasoline	
9/1/92	AX	Bose Express Music			31.00
9/3/92	BO	Rainbow Oil		20.59	
9/4/92	AX	Pepercorn Steakhouse	39.32		
9/10/92	AX	Magleby's Restaurant	38.52		
9/14/92	AX	Market Street Broiler	24.84		
9/15/92	AX	Silo			113.67
9/25/92	AX	Pepercorn Steakhouse	18.93		
9/27/92	BO	Good Music Record Co.			21.48
10/1/92	AX	Chuck-A-Rama	20.24		
10/3/92	AX	Pepercorn Steakhouse	63.49		
10/10/92	BO	Shopko			3.58
10/14/92	BO	Rainbow Oil		5.30	
10/14/92	BO	Texaco		16.11	
10/15/92	BO	Mobil Oil		19.45	
10/16/92	BO	Mobil Oil		20.70	
10/24/92	BO	Rainbow Oil		15.24	
11/1/92	AX	Chuck-A-Rama	20.24		
11/1/92	BO	Rainbow Oil		18.86	
11/2/92	AX	Home Town Buffet	6.96		
11/6/92	AX	Market Street Broiler	31.06		
11/6/92	AX	Little America Restaurant	25.85		
11/6/92	BO	Rainbow Oil		18.56	
11/10/92	AX	JB's Restaurant	18.36		
11/11/92	AX	Sizzler	16.36		
11/13/92	AX	Market Street Broiler	42.56		
11/13/92	BO	Shopko			57.60
11/14/92	BO	Rainbow Oil		15.54	
11/21/92	BO	Rainbow Oil		17.47	
11/22/92	AX	Little America Restaurant	35.07		
11/24/92	BO	Mosaic Records			102.00
11/25/92	BO	Damark Int'l			79.00
11/26/92	AX	Marriot Hotel Restaurant	27.83		
11/29/92	BO	Chuck-A-Rama	14.24		
11/30/92	AX	Time Life Music			33.99
12/1/92	AX	Chuck-A-Rama	6.75		
12/1/92	AX	Chuck-A-Rama	14.24		
12/1/92	AX	Chuck-A-Rama	13.49		
12/1/92	AX	Sizzler (NC)			29.09
12/1/92	BO	Utah Symphony			16.00
12/2/92	BO	Rainbow Oil		19.51	
12/4/92	AX	JB's Restaurant	10.62		

Exhibit H

C. Kay Cummings Candies, Inc.
Schedule of Credit Card Purchases Reimbursed By Company
For the Period September 1, 1992 Through December 31, 1994

Date	Card	Description	Subject To Allocation		100% KAY
			Meals	Gasoline	
12/5/92	AX	Hometown Buffet	22.95		
12/8/92	BO	Rainbow Oil		19.02	
12/9/92	AX	Delta Airlines (NC)			250.00
12/12/92	AX	Sizzler	15.41		
12/18/92	AX	Mervyns			10.63
12/18/92	BO	Payless Drug			42.49
12/18/92	BO	Rainbow Oil		17.76	
12/18/92	BO	Shopko			16.35
12/21/92	AX	Deseret Book			31.34
12/21/92	AX	Home Town Buffet	14.46		
12/23/92	AX	Circuit City (NC)			445.13
12/23/92	AX	Chilis (NC)			14.92
12/24/92	AX	Darryl's (NC)			29.15
12/24/92	AX	Honey Baked Ham (NC)			45.97
12/26/92	AX	Washington Duke Inn (NC)			93.51
12/26/92	BO	S & K famous Brands (NC)			28.56
12/26/92	BO	Crown (NC)			15.60
12/27/92	AX	Washington Duke Inn (NC)			55.09
1/1/93	AX	Triangle Leasing (NC)			410.40
1/1/93	AX	Chuck-A-Rama	13.49		
1/1/93	AX	Chuck-A-Rama	14.24		
1/1/93	AX	Chuck-A-Rama	14.24		
1/2/93	AX	Applebees (NC)			24.96
1/4/93	AX	Exxon Company (NC)			11.63
1/4/93	BO	The Market (NC)			25.61
1/5/93	AX	JB's Restaurant	12.04		
1/7/93	AX	Sizzler	16.03		
1/9/93	BO	Rainbow Oil		17.34	
1/11/93	AX	Home Town Buffet	14.46		
1/16/93	AX	Sizzler	17.10		
1/16/93	AX	Sizzler	2.21		
1/18/93	AX	Home Town Buffet	14.46		
1/18/93	BO	Chuck-A-Rama	14.24		
1/23/93	BO	Skippers	10.70		
1/24/93	AX	Home Town Buffet	11.35		
1/25/93	BO	Home Town Buffet	14.46		
1/25/93	BO	Rainbow Oil		16.53	
1/27/93	AX	Market Street Broiler	26.07		
1/30/93	BO	Dennys	11.23		
1/31/93	AX	Home Town Buffet	14.46		
1/31/93	BO	Rainbow Oil		9.31	

See Description of Procedures Performed

Exhibit H

C. Kay Cummings Candies, Inc.
Schedule of Credit Card Purchases Reimbursed By Company
For the Period September 1, 1992 Through December 31, 1994

Date	Card	Description	Subject To Allocation		100% KAY
			Meals	Gasoline	
2/1/93	AX	Chuck-A-Rama	13.49		
2/1/93	AX	Chuck-A-Rama	14.24		
2/1/93	AX	Home Town Buffet	14.46		
2/3/93	AX	Market Street Broiler	25.61		
2/4/93	BO	Dee's Family Restaurant	17.96		
2/5/93	AX	Chilis	27.76		
2/6/93	AX	Bookstar			14.34
2/7/93	AX	Home Town Buffet	11.35		
2/8/93	AX	Home Town Buffet	14.46		
2/9/93	BO	Rainbow Oil	16.89		
2/14/93	AX	Home Town Buffet	14.46		
2/15/93	AX	Sizzler	14.96		
2/16/93	BO	Old Spaghetti Factory	13.80		
2/17/93	BO	Rainbow Oil		16.13	
2/24/93	BO	Dee's Family Restaurant	10.20		
2/25/93	AX	Home Town Buffet	13.92		
2/26/93	AX	JB's Restaurant	12.59		
2/26/93	BO	Rainbow Oil		11.92	
2/27/93	BO	Shell Oil		12.81	
3/2/93	AX	Texaco		20.49	
3/2/93	AX	Texaco		14.49	
3/6/93	BO	Rainbow Oil		11.10	
3/13/93	AX	Chilis	21.52		
3/13/93	BO	Denny's	14.09		
3/15/93	AX	Shoney's	8.13		
3/26/93	BO	Dee's Family Restaurant	7.83		
3/27/93	AX	Sizzler	14.67		
3/27/93	BO	Rainbow Oil		15.15	
3/31/93	BO	Home Town Buffet	6.96		
4/1/93	AX	Chuck-A-Rama	13.49		
4/3/93	AX	JB's Restaurant	17.83		
4/3/93	BO	Rainbow Oil		18.01	
4/4/93	AX	Home Town Buffet	16.38		
4/5/93	AX	Home Town Buffet	14.45		
4/6/93	BO	Dee's Family Restaurant	9.76		
4/10/93	AX	J-Jeffreys	21.20		
4/12/93	BO	Rainbow Oil		18.39	
4/20/93	AX	Crustys	20.97		
4/21/93	BO	Rainbow Oil		16.68	
4/22/93	AX	Peppercorn Steak House	41.44		
4/23/93	AX	Home Town Buffet	14.46		

See Description of Procedures Performed

Exhibit H

C. Kay Cummings Candies, Inc.
Schedule of Credit Card Purchases Reimbursed By Company
For the Period September 1, 1992 Through December 31, 1994

Date	Card	Description	Subject To Allocation		100% KAY
			Meals	Gasoline	
5/14/93	FB	J-Jeffreys	31.60		
5/18/93	FB	Chevron		9.22	
5/21/93	FB	Home Town Buffet	13.92		
5/22/93	AX	ZCMI			38.52
5/22/93	FB	J-Jeffreys	10.60		
5/22/93	FB	Rainbow Oil		16.81	
5/22/93	FB	Shopko			11.09
5/27/93	FB	Amoco		14.25	
5/30/93	FB	Chuck-A-Rama	6.75		
6/4/93	AX	TGI Fridays	15.64		
6/5/93	FB	Shopko			20.63
6/7/93	FB	Johanna's Kitchen	13.57		
6/12/93	FB	J-Jeffreys	38.89		
6/12/93	FB	Mervyns			7.97
6/12/93	FB	Mervyns			22.30
6/12/93	FB	Rainbow Oil		18.15	
6/18/93	FB	J-Jeffreys	23.49		
6/23/93	FB	Chuck-A-Rama	13.49		
6/24/93	FB	Barnes & Noble			21.14
6/25/93	FB	Rainbow Oil		17.90	
6/26/93	FB	Sizzling Platter	17.88		
7/1/93	FB	Rainbow Oil		14.37	
7/1/93	FB	JB's Restaurant	12.60		
7/2/93	FB	Little America Restaurant	29.77		
7/3/93	FB	Shopko			99.00
7/7/93	AX	Lands End			73.75
7/9/93	FB	Rainbow Oil		17.17	
7/10/93	FB	J-Jeffreys	12.45		
7/11/93	FB	Home Town Buffet	11.35		
7/12/93	FB	Home Town Buffet	6.96		
7/15/93	FB	Diamond Lil's	29.31		
7/16/93	FB	Rainbow Oil		10.87	
7/17/93	FB	Dee's Family Restaurant	11.70		
7/19/93	FB	Hilton Restaurant	6.90		
7/23/93	FB	Dee's Family Restaurant	7.75		
7/26/93	FB	Rainbow Oil		16.36	
7/27/93	FB	Sixth Street Diner	18.27		
7/30/93	FB	Utah Symphony			47.60
7/31/93	FB	Soundoff			31.86
7/31/93	FB	Dee's Family Restaurant	11.36		
8/2/93	FB	Hilton Restaurant	6.50		

Exhibit H

C. Kay Cummings Candies, Inc.
Schedule of Credit Card Purchases Reimbursed By Company
For the Period September 1, 1992 Through December 31, 1994

Date	Card	Description	Subject To Allocation		100% KAY
			Meals	Gasoline	
8/3/93	FB	Rainbow Oil		16.95	
8/3/93	FB	Texaco		15.59	
8/5/93	AX	Sleep Inn South Jordan (UT)			147.52
8/7/93	FB	Rainbow Oil		12.30	
8/7/93	FB	Texaco		14.03	
8/9/93	FB	Sizzling Platter	17.33		
8/11/93	FB	Sizzling Platter	10.25		
8/14/93	FB	Rainbow Oil		14.31	
8/14/93	FB	Little America Restaurant	4.83		
8/15/93	FB	Home Town Buffet	5.46		
8/17/93	AX	Magleby's	35.07		
8/18/93	AX	Shoney's	20.73		
8/19/93	AX	Village Inn	14.43		
8/19/93	AX	Shoney's	12.53		
8/20/93	AX	Texaco		16.85	
8/20/93	BO	BYU Bookstore			8.50
8/20/93	BO	Texaco		17.73	
8/22/93	AX	Home Town Buffet	11.35		
8/27/93	FB	Utah Symphony			40.50
8/31/93	FB	Shopko			19.93
9/6/93	BO	Rainbow Oil		13.00	
9/6/93	FB	Home Town Buffet	6.96		
9/6/93	FB	Shopko			52.25
9/6/93	FB	Mervyns			25.48
9/10/93	FB	Little America Restaurant	19.40		
9/11/93	BO	Cash Saver's		10.05	
9/11/93	FB	Sizzling Platter	9.63		
9/24/93	AX	Utah Symphony			45.00
10/9/93	AX	JB's Restaurant	14.41		
10/10/93	FB	Rainbow Oil		17.54	
10/15/93	FB	Little America Restaurant	17.70		
10/16/93	FB	Little America Restaurant	9.42		
10/19/93	FB	Shopko			5.29
10/19/93	FB	Old Spaghetti Factory	9.69		
10/25/93	AX	Home Town Buffet	14.26		
10/25/93	BO	Rainbow Oil		17.98	
10/26/93	AX	JB's Restaurant	14.25		
10/29/93	BO	Little America Restaurant	13.00		
10/30/93	AX	Little America	28.03		
11/2/93	BO	Rainbow Oil		18.44	
11/5/93	FB	Little America Restaurant	29.14		

See Description of Procedures Performed

Exhibit H

**C. Kay Cummings Candies, Inc.
Schedule of Credit Card Purchases Reimbursed By Company
For the Period September 1, 1992 Through December 31, 1994**

Date	Card	Description	Subject To Allocation		100% KAY
			Meals	Gasoline	
11/9/93	BO	Rainbow Oil		12.84	
11/9/93	BO	Little America Restaurant	18.76		
11/11/93	BO	Olive Garden	15.56		
11/12/93	AX	Little America Restaurant	26.75		
11/14/93	BO	Dee's Family Restaurant	10.08		
11/18/93	FB	Rainbow Oil		17.67	
11/19/93	BO	Little America Restaurant	20.03		
11/25/93	FB	Shopko			26.55
11/27/93	FB	Utah Symphony			18.00
11/29/93	BO	BYU Music Box Office			72.00
11/30/93	BO	Rainbow Oil		16.16	
12/2/93	FB	Radio Shack			42.49
12/3/93	AX	Little America Restaurant	6.11		
12/6/93	FB	Olive Garden	19.93		
12/7/93	FB	Honey Baked Ham			42.09
12/8/93	FB	Olive Garden	12.73		
12/9/93	BO	WME-Mag/CD			24.93
12/9/93	FB	JC Penny			14.86
12/9/93	FB	Sam Goody			24.42
12/10/93	FB	Rainbow Oil		18.06	
12/10/93	FB	Little America Restaurant	17.70		
12/10/93	FB	Soundoff			14.86
12/11/93	FB	Desert Book			49.30
12/12/93	FB	Olive Garden	15.34		
12/13/93	BO	BYU Ticket Office			139.00
12/13/93	FB	Felt Buchorn			164.37
12/13/93	FB	ZCMI			39.84
12/14/93	FB	J-Jeffreys	40.28		
12/16/93	FB	ZCMI			161.46
12/17/93	FB	Shopko			14.85
12/17/93	FB	Little America Restaurant	19.40		
12/19/93	FB	Olive Garden	19.40		
12/19/93	FB	Barnes & Noble			29.53
12/19/93	FB	Toys R Us			18.05
12/19/93	FB	Rainbow Oil		16.00	
12/20/93	FB	Toys R Us			19.09
12/20/93	FB	Toys R Us			2.75
12/23/93	AX	Applebees (NC)			33.67
12/23/93	BO	WME-BBC-Mag/CD			5.87
12/23/93	BO	WME-BBC-Mag/CD			5.87
12/23/93	BO	WME-BBC-Mag/CD			2.98

See Description of Procedures Performed

Exhibit H

C. Kay Cummings Candies, Inc.
Schedule of Credit Card Purchases Reimbursed By Company
For the Period September 1, 1992 Through December 31, 1994

Date	Card	Description	Subject To Allocation		100% KAY
			Meals	Gasoline	
12/23/93	FB	Chilis (NC)	32.47		
12/24/93	FB	Honey Baked Ham (NC)			49.92
12/26/93	AX	Outback Steakhouse (NC)			57.99
12/26/93	FB	Citgo (NC)		13.25	
12/26/93	FB	Delta Airlines (NC)			250.00
12/27/93	AX	Angus Barn Restaurant (NC)			103.86
12/27/93	AX	The Biltmore Co. (NC)			5.83
12/27/93	AX	Comfort Inn (NC)			124.26
12/27/93	AX	The Biltmore Co. (NC)			41.80
12/28/93	FB	Darryl's (NC)	19.36		
12/28/93	FB	Exxon		15.15	
12/29/93	AX	Texaco (CA)			15.41
12/29/93	FB	Texaco (CA)			10.00
12/29/93	FB	Brant's Motel (CA)			27.50
12/29/93	FB	Golden Nugget Rest. (CA)			28.50
12/30/93	AX	Anthony's Fish (CA)			56.07
12/30/93	BO	Chevron (CA)			19.00
12/31/93	AX	Avis Rent-A-Car (CA)			201.65
12/31/93	AX	Sleep Inn St. George (CA)			55.71
12/31/93	FB	Goodyear (CA)			11.00
1/1/94	AX	Triangle Leasing (NC)			210.60
1/2/94	FB	Barnes & Noble			33.35
1/5/94	FB	Rainbow Oil		13.80	
1/7/94	BO	WME-BBC-Mag/CD			3.34
1/7/94	FB	Little America Restaurant	9.85		
1/7/94	FB	Joe Morley's	17.16		
1/9/94	FB	Home Town Buffet	12.34		
1/11/94	FB	Della Fontana	25.38		
1/12/94	AX	TGI Fridays	23.82		
1/15/94	FB	Rainbow Oil		13.00	
1/22/94	AX	Sizzler	19.25		
1/29/94	BO	WME-BBC-Mag/CD			5.87
1/29/94	FB	Rainbow Oil		14.78	
2/19/94	AX	Chevron		13.22	
2/20/94	FB	Upper Access Books			19.95
3/11/94	AX	Little America Restaurant	19.08		
3/14/94	AX	Time-Life Music			126.49
3/15/94	AX	Chevron		12.22	
3/15/94	AX	Media Arts International			99.89
3/15/94	FB	Amazing Medicines Book			29.97
3/17/94	AX	Bookstar			22.90

Exhibit H

C. Kay Cummings Candies, Inc. Schedule of Credit Card Purchases Reimbursed By Company For the Period September 1, 1992 Through December 31, 1994

Date	Card	Description	Subject To Allocation		100% KAY
			Meals	Gasoline	
3/17/94	FB	Rainbow Oil		15.70	
3/26/94	AX	Media Play			26.50
3/26/94	AX	Media Play			16.81
3/31/94	FB	Rainbow Oil		14.09	
4/1/94	AX	Ristorante Dell Font.	12.77		
4/2/94	FB	Little America Restaurant	63.38		
4/6/94	AX	Market Street Broiler	22.67		
4/9/94	AX	Village Inn	13.67		
4/15/94	AX	Little America Restaurant	11.80		
4/20/94	AX	BBC Publications			2.89
4/23/94	AX	JB's Restaurant	16.58		
4/25/94	FB	Rainbow Oil		16.49	
4/28/94	FB	Los Hermanos	12.30		
4/28/94	FB	Chuck-A-Rama	14.24		
4/30/94	FB	Little America	32.71		
4/30/94	FB	L' Hermitage		20.35	
5/2/94	FB	Mervyns			19.11
5/4/94	FB	Dee's Family Restaurant	13.90		
5/5/94	FB	Chuck-A-Rama	14.24		
5/6/94	AX	TGI Fridays	25.09		
5/6/94	AX	ZCMI			127.48
5/6/94	FB	Rainbow Oil		18.53	
5/7/94	FB	Spoons 'N Spice	39.83		
5/9/94	FB	Shopko			56.44
5/10/94	FB	Home Town Buffet	14.46		
5/11/94	FB	Rainbow Oil		10.89	
5/16/94	AX	BBC Publications			5.87
5/27/94	AX	Little America Restaurant	30.05		
5/28/94	FB	Circle K		20.50	
6/1/94	AX	Ristorante Dell Font.	11.26		
6/2/94	FB	BYU Ticket Office			408.00
6/10/94	AX	Little America Restaurant	13.30		
6/11/94	FB	Tri-Mart		17.00	
6/12/94	AX	BBC Publications			5.87
6/15/94	FB	Wal-Mart			15.90
6/18/94	AX	Little America Restaurant	21.70		
6/18/94	FB	Rainbow Oil		19.00	
6/22/94	AX	Olive Garden	10.08		
6/24/94	FB	Wal-Mart			129.49
6/25/94	AX	China Star Express	20.12		
6/26/94	FB	Shopko			8.91

Exhibit H

C. Kay Cummings Candies, Inc.
Schedule of Credit Card Purchases Reimbursed By Company
For the Period September 1, 1992 Through December 31, 1994

Date	Card	Description	Subject To Allocation		100% KAY
			Meals	Gasoline	
6/29/94	FB	CTI Publishers			52.90
6/29/94	FB	Rainbow Oil		18.25	
6/30/94	FB	The Old Spaghetti Factory	13.31		
7/1/94	AX	Ristorante Dell Font.	10.76		
7/1/94	AX	Ristorante Dell Font.	10.74		
7/6/94	FB	Rainbow Oil		17.86	
7/8/94	AX	Little America Restaurant	21.85		
7/9/94	AX	BBC publications			5.87
7/13/94	AX	Archibalds	26.17		
7/13/94	BO	Rainbow Oil		19.37	
7/13/94	FB	Rainbow Oil		19.02	
7/15/94	BO	Shopko			10.80
7/17/94	AX	Home Town Buffet	11.76		
7/22/94	AX	Little America Restaurant	26.07		
7/22/94	BO	Rainbow Oil		20.13	
7/24/94	AX	Home Town Buffet	5.67		
7/28/94	BO	Old Spaghetti Factory	12.94		
7/30/94	BO	Media Play			24.81
8/4/94	AX	Radio Shack			70.02
8/5/94	BO	Little America Restaurant	23.80		
8/5/94	BO	Rainbow Oil		20.50	
8/7/94	AX	BBC Publications			5.87
8/8/94	AX	Desert Book			25.37
8/13/94	BO	Mervyns			50.90
8/13/94	BO	Rainbow Oil		19.06	
8/14/94	BO	Home Town Buffet	14.44		
8/17/94	AX	Magleby's Restaurant	20.01		
8/18/94	AX	BYU Bookstore			19.06
8/19/94	AX	Comfort Inn-Provo (UT)			275.12
8/20/94	BO	Socks Galore			22.01
8/20/94	BO	Chevron		15.16	
8/21/94	AX	Texaco		23.70	
8/24/94	AX	Texaco		9.46	
8/24/94	BO	Rainbow Oil		16.82	
8/26/94	AX	Magleby's Restaurant	33.96		
8/27/94	AX	Baci Trattoria	41.75		
8/27/94	AX	ZCMI			18.19
8/27/94	AX	ZCMI			22.29
8/28/94	AX	Home Town Buffet	5.67		
8/29/94	BO	Rainbow Oil		20.60	
9/8/94	AX	BBC Publications			5.87

See Description of Procedures Performed

Exhibit H

C. Kay Cummings Candies, Inc.
Schedule of Credit Card Purchases Reimbursed By Company
For the Period September 1, 1992 Through December 31, 1994

Date	Card	Description	Subject To Allocation		100% KAY
			Meals	Gasoline	
9/9/94	BO	Rainbow Oil		20.39	
9/16/94	BO	Rainbow Oil		18.04	
9/21/94	BO	Shopko			59.40
9/22/94	BO	Rainbow Oil		20.41	
9/29/94	BO	Rainbow Oil		21.09	
10/1/94	AX	Little America Restaurant	129.40		
10/1/94	AX	Village Inn	24.66		
10/1/94	AX	Ristorante Dell Font.	11.24		
10/7/94	BO	Rainbow Oil		17.26	
10/8/94	BO	Mervyns			11.67
10/9/94	AX	BBC Publications			5.87
10/14/94	FB	Rainbow Oil		5.00	
10/17/94	FB	Rainbow Oil		19.86	
10/22/94	FB	Rainbow Oil		15.23	
10/26/94	FB	Rocky Mtn. Grill	18.47		
10/28/94	AX	Little America Restaurant	19.70		
10/28/94	FB	Rainbow Oil		7.97	
10/31/94	AX	Home Town Buffet	6.95		
11/1/94	AX	Mervyns			12.74
11/3/94	BO	Rainbow Oil		18.50	
11/5/94	AX	Brick Oven	32.70		
11/7/94	AX	Home Town Buffet	6.95		
11/7/94	BO	Rainbow Oil		17.33	
11/9/94	AX	BBC Publications			5.87
11/14/94	AX	Straight Talk Publications			39.50
11/18/94	AX	Little America Restaurant	17.70		
11/19/94	BO	Rainbow Oil		19.00	

Total Charges Subject to Allocation:

Meals (see allocation at Exhibit G)	<u>\$ 3,292.12</u>	
Gasoline (see allocation at Exhibit F)		<u>\$ 1,491.04</u>

Total Charges 100% to Kay (see Exhibit J)	<u><u>\$ 6,916.51</u></u>
--	---------------------------

C. KAY CUMMINGS CANDIES, INC.

SCHEDULE OF CREDIT CARD PURCHASES REIMBURSED BY COMPANY

FOR THE PERIOD SEPTEMBER 1, 1992 THROUGH DECEMBER 31, 1994

CRITERIA FOR SELECTION AND CATEGORIZATION OF CREDIT CARD PURCHASES:

The following is the criteria that was used to select and categorize credit card charges from credit card statements paid by the Company for the applicable period:

- A. Meals - All local meals purchased.
- B. Gasoline - All gasoline purchased except charges for out-of-town business travel when a rental car was used. Additionally, nonbusiness out-of-town charges for gasoline are not included in this column.
- C. 100% C. Kay - All charges during the period reimbursed by the Company that were not identifiable as business nor did they relate to allocable meals or gasoline. These include purchases at department stores, subscriptions, mail orders, nonbusiness out-of-town expenses, etc.

See description of procedures performed.

Exhibit I

C. Kay Cummings Candies, Inc.
Schedule of Cash Purchases Reimbursed By Company
For the Period September 1, 1992 Through December 31, 1994

Check #	CHECK DATE	REPORT DATE	Subject To Allocation		100% Kay
			Meals	Gasoline	
11,266	4/26/93	9/7/92	75.43		39.29
11,266	4/26/93	9/26/92	93.96		7.20
10,455	10/22/92	10/5/92	60.47		59.88
10,551	11/13/92	10/12/92	55.51	92.06	57.92
11,266	4/26/93	11/12/92	76.79		37.92
10,551	11/13/92	11/13/92			200.00
10,635	12/4/92	11/14/92	75.66		31.45
11,266	4/26/93	11/19/92	26.20	24.07	80.48
11,282	4/30/93	11/20/92	5.13		39.69
11,282	4/30/93	11/23/92			25.82
10,704	12/19/92	11/28/92	26.96		16.23
10,925	2/5/93	12/4/92	21.13		45.33
11,282	4/30/93	12/11/92	24.43		25.77
10,704	12/19/92	12/12/92			66.63
11,282	4/30/93	12/17/92	29.88		70.31
11,282	4/30/93	12/21/92	51.85		94.36
11,282	4/30/93	1/9/93	73.79		91.67
11,310	5/10/93	1/15/93	49.32		238.27
11,310	5/10/93	1/25/93	50.40	16.01	93.19
11,310	5/10/93	2/3/93			95.99
11,363	5/21/93	2/5/93			10.78
11,310	5/10/93	2/12/93	29.70		42.70
11,310	5/10/93	2/18/93	35.99		40.52
11,310	5/10/93	2/26/93	10.03		26.53
11,310	5/10/93	3/6/93	21.12		97.11
11,334	5/14/93	3/13/93			38.88
11,334	5/14/93	3/20/93	27.63	17.42	24.50
11,334	5/14/93	3/26/93	25.58		17.05
11,334	5/14/93	4/2/93	32.02		60.68
11,334	5/14/93	4/8/93	24.48		14.46
11,334	5/14/93	4/12/93	52.14		18.39
11,363	5/21/93	4/22/93	54.62		39.04
11,363	5/21/93	5/6/93	42.43	20.54	25.31
11,363	5/21/93	5/17/93	39.53	10.89	76.48
11,778	8/27/93	5/31/93			16.81
11,778	8/27/93	7/12/93	64.75		57.61
11,778	8/27/93	7/30/93	70.70		17.91
11,778	8/27/93	8/7/93	11.68	5.25	157.32
11,778	8/27/93	8/20/93	33.76		20.63
11,885	9/23/93	8/30/93	11.48		51.36
11,949	10/8/93	9/10/93	3.84	43.22	16.95

Exhibit I

C. Kay Cummings Candies, Inc.
Schedule of Cash Purchases Reimbursed By Company
For the Period September 1, 1992 Through December 31, 1994

Check #	CHECK DATE	REPORT DATE	Subject To Allocation		100% Kay
			Meals	Gasoline	
11,949	10/8/93	9/17/93	32.58	31.26	44.83
11,949	10/8/93	9/30/93	34.97	33.76	11.38
11,949	10/8/93	10/2/93	36.15		46.73
12,292	1/6/94	10/13/93	39.21		57.31
12,292	1/6/94	10/20/93	27.07		265.62
12,292	1/6/94	11/6/93	59.58		53.37
12,185	12/3/93	11/18/93	49.31		19.82
12,292	1/6/94	12/4/93	80.61		43.50
13,049	7/8/94	12/20/93	39.63		135.51
12,722	4/8/94	1/8/94	119.79		108.88
12,722	4/8/94	1/29/94	85.39		29.69
12,722	4/8/94	2/19/94	83.21		24.00
12,722	4/8/94	2/25/94			6.93
12,722	4/8/94	3/16/94	34.44		267.58
12,722	4/8/94	3/24/94	35.00		43.22
12,722	4/8/94	3/31/94	7.34		6.36
12,749	4/14/94	4/11/94	52.08	16.20	94.01
12,980	6/22/94	4/18/94			3.25
12,980	6/22/94	4/21/94	36.26		51.00
13,049	7/8/94	4/27/94	18.40	16.49	55.58
13,049	7/8/94	6/15/94	45.71		9.00
13,049	7/8/94	6/29/94	8.02	54.25	13.24
13,260	9/2/94	7/11/94	40.85		2.00
13,260	9/2/94	7/19/94	18.39		281.34
13,260	9/2/94	8/1/94	5.67	17.86	309.26
13,260	9/2/94	8/11/94	83.25	19.37	26.91
13,260	9/2/94	8/25/94	136.70		48.74
13,348	9/30/94	9/9/94	47.42		31.83
13,348	9/30/94	9/18/94	30.96		81.09
13,348	9/30/94	9/26/94	16.00		45.66
14,055	12/15/94	12/15/94	26.07		15.22

Total Charges Subject to Allocation:

Meals (see allocation at Exhibit G) \$ 2,718.45
Gasoline (see allocation at Exhibit F) \$ 418.65

Total Charges 100% to Kay (see Exhibit J) \$ 4,521.28

C. KAY CUMMINGS CANDIES, INC.

SCHEDULE OF CASH PURCHASES REIMBURSED BY COMPANY

FOR THE PERIOD SEPTEMBER 1, 1992 THROUGH DECEMBER 31, 1994

CRITERIA FOR SELECTION AND CATEGORIZATION OF CASH PURCHASES:

The following is the criteria that was used to select and categorize cash purchases from expense reports paid by the Company for the applicable period:

- A. Meals - All local meals purchased.
- B. Gasoline - All gasoline purchased except charges for out-of-town business travel when a rental car was used. Additionally, nonbusiness out-of-town charges for gasoline are not included in this column.
- C. 100 C. Kay - All charges during the period reimbursed by the Company that were not identifiable as business nor did they relate to allocable meals or gasoline. These include purchases at department stores, subscriptions, health insurance premiums, prescriptions, cleaners, nonbusiness out-of-town expenses, etc.

See description of procedures performed.

C. KAY CUMMINGS CANDIES, INC.

EXHIBIT C

SCHEDULE OF OWNERS MISCELLANEOUS PERSONAL EXPENSES PAID BY COMPANY

FOR THE PERIOD SEPTEMBER 1, 1992 THROUGH DECEMBER 31, 1994

MISCELLANEOUS PERSONAL EXPENSES PAID BY COMPANY:

Total miscellaneous personal expenses purchased with credit cards (see Exhibit H)	\$ 6,916.51
Total miscellaneous personal expenses purchased with cash (see Exhibit I)	<u>4,521.28</u>
TOTAL C. KAY'S MISCELLANEOUS PERSONAL EXPENSES PAID BY COMPANY	<u>\$11,437.79</u>

See description of procedures performed.

C. KAY CUMMINGS CANDIES, INC.SCHEDULE OF ALLOCATION OF INCOME TAXES TO OWNERSFOR THE PERIOD SEPTEMBER 1, 1992 THROUGH DECEMBER 31, 1994ALLOCATION OF INCOME TAXES BASED ON INCOME AND OTHER BENEFITS RECEIVED (EXCLUDING SALARIES AND WAGES):

	<u>C. Kay</u>	<u>Oletta</u>	<u>Total</u>
<u>ALLOCATION OF INCOME TAXES:</u>			
Total income taxes paid with owners draws (see Exhibit C)			\$ 93,958.00
Income taxes attributable to under withholding for owner's salaries and wages	\$ 12,288.00	\$ 841.93	\$ (13,129.93)
Total amount of income taxes paid during the period attributable to the net income of the Company			80,828.07
Percentage of income and other benefits received by owners (excluding salaries and wages and income taxes)	0.61	0.39	1.00
Allocation of income taxes (excluding under withholding of income taxes, for owners' salaries and wages)	49,651.63	31,176.44	80,828.07
Income taxes attributable to under withholding for owner's salaries and wages	12,288.00	841.93	13,129.93

<u>ALLOCATION OF INCOME TAXES PAID WITH OWNER DRAWS</u>	<u>\$ 61,939.63</u>	<u>\$32,018.37</u>	<u>\$ 93,958.00</u>
---	---------------------	--------------------	---------------------

CALCULATION OF UNDER WITHHELD INCOME TAXES ON OWNERS SALARIES AND WAGES:

Salaries and wages paid to owners	\$ 60,000.00	\$ 2,682.67	\$ 62,682.67
Applicable tax rate	0.35	0.35	0.35
Amount of income taxes which should have been withheld from owner's salaries and wages	21,000.00	938.93	21,938.93
W-2 income taxes withheld during the period	8,712.00	97.00	8,809.00

TOTAL INCOME TAXES UNDER WITHHOLD ON OWNERS
SALARIES AND WAGES

<u>\$ 12,288.00</u>	<u>\$ 841.93</u>	<u>\$ 13,129.93</u>
---------------------	------------------	---------------------

CALCULATION OF PERCENTAGE OF INCOME AND OTHER BENEFITS RECEIVED BY OWNERS (EXCLUDING SALARIES AND WAGES AND INCOME TAXES):

<u>Amounts of income and other benefits received by owners (excluding salaries and wages and income tax):</u>			
Owner draws excluding income taxes (see Exhibit C)	\$ 72,696.24	\$43,846.93	\$116,543.17
Factory rent payments (see Exhibit E)	30,100.00	35,300.00	65,400.00
Company automobile use (see Exhibit F)	8,884.89	-	8,884.89
<u>Expenses Reimbursements:</u>			
Personal meal expense (see Exhibit G)	2,930.57	-	2,930.57
Personal miscellaneous expense (see Exhibit J)	11,437.79	-	11,437.79

TOTAL INCOME AND OTHER BENEFITS RECEIVED BY OWNERS
(EXCLUDING SALARIES AND WAGES AND INCOME TAXES)

<u>\$126,049.49</u>	<u>\$79,146.93</u>	<u>\$205,196.42</u>
---------------------	--------------------	---------------------

PERCENTAGE OF INCOME AND OTHER BENEFITS RECEIVED
BY OWNERS (EXCLUDING SALARIES AND WAGES AND
INCOME TAXES)

0.61	0.39	1.00
------	------	------

See description of procedures performed.

C. KAY CUMMINGS CANDIES, INC.

ACTUAL TAX COMPUTATIONS

CALENDAR 1992

	<u>S Corporation</u>	<u>C. Kay Cummings</u>	<u>Oletta Cummings</u>	<u>Total C. Kay & Oletta</u>
es revenue	\$1,125,388	\$ -	\$ -	\$ -
it of sales	<u>(493,456)</u>	<u>-</u>	<u>-</u>	<u>-</u>
ss profit	<u>631,932</u>	<u>-</u>	<u>-</u>	<u>-</u>
eral selling expenses	(487,455)	-	-	-
tory and lease expenses	(17,100)	8,550	8,550	17,100
ers' salaries	(27,637)	26,000	1,637	27,637
porate net income	<u>99,740</u>	<u>-</u>	<u>-</u>	<u>-</u>
ocation to owners	(99,790)	49,870	49,870	99,740
erest and dividend income	-	3,293	3,293	6,586
mized deductions	-	(24,781)	(24,781)	(49,562)
mptions	<u>-</u>	<u>(2,300)</u>	<u>(2,300)</u>	<u>(4,600)</u>
ABLE INCOME	<u>\$ -</u>	<u>\$ 60,632</u>	<u>\$ 36,269</u>	<u>\$ 96,901</u>
		<u>62.57%</u>	<u>37.43%</u>	<u>100.00%</u>

C. KAY CUMMINGS CANDIES, INC.ACTUAL TAX COMPUTATIONSCALENDAR 1993

	<u>S Corporation</u>	<u>C. Kay Cummings</u>	<u>Oletta Cummings</u>	<u>Total C. Kay & Oletta Cummings</u>
Sales revenue	\$1,281,404	\$ -	\$ -	\$ -
Cost of sales	<u>(574,618)</u>	<u>-</u>	<u>-</u>	<u>-</u>
Gross profit	<u>706,786</u>	<u>-</u>	<u>-</u>	<u>-</u>
General selling and administration costs	(509,577)	-	-	-
Factory and lease	(23,900)	11,950	11,950	23,900
Owners' salaries	<u>(27,909)</u>	<u>26,000</u>	<u>1,909</u>	<u>27,909</u>
Allocation to owners	(145,400)	72,700	72,700	145,400
Other investment income	-	4,275	4,275	8,551
Itemized deductions	-	(9,612)	(9,612)	(19,225)
Exemptions	<u>-</u>	<u>(1,504)</u>	<u>(1,504)</u>	<u>(3,008)</u>
TAXABLE INCOME	<u>\$ -</u>	<u>\$103,809</u>	<u>\$ 79,718</u>	<u>\$183,527</u>
		<u>56.56%</u>	<u>43.44%</u>	<u>100.00%</u>

ADDENDUM "D"

**COURT-APPOINTED EXPERT'S ANALYSIS OF INCOME AND
OTHER BENEFITS RECEIVED BY C. KAY CUMMINGS
AND OLETTA CUMMINGS**

C. KAY CUMMINGS CANDIES, INC.

VALUATION REPORT

DECEMBER 31, 1993

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	3
INDEPENDENT APPRAISAL	3
DEFINITION OF FAIR MARKET VALUE	3
FUNDAMENTAL FACTORS CONSIDERED IN THE VALUATION	4
SPECIFIC VALUATION METHOD USED	4
APPLICATION OF THE CAPITALIZATION OF EARNINGS METHOD	5-6
CALCULATIONS USING THE CAPITALIZATION OF EARNINGS METHOD	6
CONCLUSION	7
APPENDIX A WEIGHTED AVERAGE AFTER TAX EARNINGS	8
APPENDIX B DEVELOPMENT OF CAPITALIZATION RATE	9
EXHIBIT B-1 KEY VARIABLES FROM IBBOTSON ASSOCIATES STOCKS, BONDS, BILLS AND INFLATION YEARBOOK	10
APPENDIX C SCHEDULE OF NON-OPERATING ASSETS	11
APPENDIX D WARDLEY CORPORATION MARKET ANALYSIS OF REAL ESTATE AT 2057 East 3300 South	12-34
APPENDIX E SCHEDULE OF BONDS PAYABLE TO FIRST SECURITY BANK	35
APPENDIX F ASSUMPTIONS AND LIMITING CONDITIONS	36
APPENDIX G NORMALIZED STATEMENT OF INCOME FOR THE YEARS ENDED DECEMBER 31, 1989 THROUGH DECEMBER 31, 1993	37-38
APPENDIX H NORMALIZED BALANCE SHEETS AS OF DECEMBER 31, 1989 THROUGH DECEMBER 31, 1993	39-40
APPENDIX I COMMON SIZED BALANCE SHEETS AS OF DECEMBER 31, 1989 THROUGH DECEMBER 31, 1993	41
APPENDIX J COMMON SIZED STATEMENT OF INCOME FOR THE YEARS ENDED DECEMBER 31, 1989 THROUGH DECEMBER 31, 1993	42
APPENDIX K RATIO ANALYSIS, 1989 THROUGH 1993	43



CERTIFIED PUBLIC ACCOUNTANTS

ROGER B. PINNOCK, CPA
RONALD D. ROBBINS, CPA
DAVID T. POSEY, CPA
ROGER O. RICHINS, CPA

July 28, 1994

C. Kay Cummings Candies, Inc.
2057 East 3300 South
Salt Lake City, UT 84109

Judge Glen K. Iwasaki
Third Judicial District Court in-and-for
Salt Lake County, State of Utah

INTRODUCTION

At your request we have prepared a valuation analysis of C. Kay Cummings Candies, Inc. The purpose of this study is to arrive at the fair market value of the Company to be used for the divorce proceedings of Oletta Cummings, plaintiff vs. Clyde Kay Cummings, defendant.

This evaluation is based upon information submitted by Company representatives, including federal corporate income tax returns and unaudited financial statements. We have assumed that this information is fundamentally correct.

Our evaluation of C. Kay Cummings Candies, Inc. (the Company) is as of December 31, 1993 and is based on the five prior years of actual financial information.

INDEPENDENT APPRAISAL

We have no present or contemplated future interest, relationships, or personal dealings with the Company, its owners, or officers which would tend to prevent a fair and unbiased evaluation of the value of the business.

DEFINITION OF FAIR MARKET VALUE AS USED IN THIS REPORT

The fair market value of a business is the price at which the business would change hands between a willing buyer and a willing seller. A willing buyer or seller is under no compulsion to buy or sell, and has reasonable knowledge of all relevant facts.

FUNDAMENTAL FACTORS CONSIDERED IN THE VALUATION

In valuing the business, we have considered all available financial data, as well as other factors which we considered relevant. The following factors are fundamental in any valuation assignment and were considered in our analysis:

1. The nature of the business and the history of the enterprise from its start.
2. The economic outlook in general, and the conditions and outlook of this specific industry.
3. The book value of the Company and the related financial condition of the business.
4. The earnings capacity of the Company.
5. The capacity of the business to pay earnings out to its owners.
6. Whether or not the enterprise has goodwill or other intangible value.
7. Whether or not there has been previous sales of Company stock.
8. Whether or not there are sales of similar entities that can reasonably be compared to this Company.

SPECIFIC VALUATION METHOD USED

There is no universal formula which is applicable to all valuation situations. Since C. Kay Cummings Candies, Inc. is a small closely held corporation and its stock is not traded on any stock market, it was not possible to find comparable sales information. Our valuation method focused upon the ability of the Company to generate earnings, and the underlying net fair market value of its real estate and non-operating assets. To evaluate the fair market value of the Company's earnings capacity, we used the CAPITALIZATION OF EARNINGS METHOD.

We believe the total fair market value of the Company is equal to; 1) the value of the Company's earnings capacity, plus; 2) the fair market value of the Company's real estate, less; 3) the liability outstanding on that real estate, plus; 4) the fair market value of certain non-operating assets.

The net book value of the real estate should be added to the value of the earning capacity of the business in this case because of the following:

1. The Company has paid a fair market rent to the Cummings family, for the use of the real estate for all years the real estate was occupied by the business except for 1992 and 1993. The financial statements and tax returns of the Company reflect this rent expense from 1984 through 1991, as if the real estate was owned "outside" of the corporation by the Cummings family. To make the financial statements comparable to this earlier period. We have adjusted the financial statement for 1992 and 1993 to continue this "as if" owned outside of the corporation treatment.
2. The net value of the real estate is of such significance, it is not reasonable to assume that its value is also contained within the fair market value of the business as determined using the valuation of earnings capacity method. The earnings capacity method valuation does include the value of the normal operating assets used to generate the earnings. Many small businesses of this size and nature do not own significant real estate assets, and are commonly evaluated using the valuation of earnings capacity method. Such earnings are evaluated net of rent paid for use of needed real property.

APPLICATION OF THE CAPITALIZATION OF EARNINGS METHOD

After earnings are adjusted and weighed, average earnings are divided by an appropriate capitalization rate to arrive at the value of the business. See Appendix G, Normalized (adjusted) Statement of Income for the year ended December 31, 1989 through December 31, 1993 on pages 36 and 37. The "As Reported" column is taken from the Company's corporate federal tax returns.

Earnings for 1992 and 1993 were adjusted to be consistent with the prior years treatment of the Company's real estate as follows:

1. Rent expense of \$50,000 was added to 1993
2. Bond interest expense of \$19,600 on the real estate debt was removed from 1993
3. Depreciation expense of \$16,263 on the real estate was removed from 1993 and 1992
4. Other expenses of \$16,843 were added to 1993, \$1,901 to 1992, \$9,331 and \$217 to 1991, and \$10,000 to 1989, to reflect business expenses not allowed on the S Corporation tax return, that should be considered deductible expenses for purposes of this analysis. All of these expenses were ordinary and necessary business expenses for the operation of the Company, but were required to be separately stated and passed through to the shareholders of the S Corporation, or were given other special treatment on the tax returns, as per the requirements of the tax code.

Income taxes were provided at current corporate tax rates to reflect a standard tax burden upon company net earnings.

Salaries to owners, which have averaged less than \$30,000 per year were not considered excessive and not adjusted. Other personal benefits paid out of the corporation to the owners have been treated as S Corporation distributions of capital and not as deductible expenses, and therefore did not need to be added back to earnings.

We have weighted the most recent years higher than earlier years to produce a weighted average earnings that reflects the latest years as being more important in the evaluation of the earnings than earlier years. (See Appendix A)

The selection of an appropriate capitalization rate (also referred to as the CAP rate) is difficult and requires professional judgment. The capitalization rate is the rate of return an investor would expect on this type of investment after considering other rates of return and relative risk. For example, a low risk business might use a capitalization rate of 10%. A higher risk company might use a capitalization rate of 20%. A very high risk company might be capitalized at 50%.

In developing the capitalization rate for the Company we considered the following:

1. The nature of the business
2. The risk involved
3. The stability of earnings
4. The current prime interest rate at local banks
5. The current long-term government bond rate
6. The current treasury bill rate
7. The current mortgage rates
8. The rate of return on publicly traded stocks for small and large public utilities

This general information considered gave us a background for the current rates of return (capitalization rate) expected by investors given the risk of the investment and how the risk of these investments compared to the risk inherent with C. Kay Cummings Candies, Inc.

The principles used in our development of an appropriate capitalization rate are outlined as follows: (See Appendix B and Exhibit B-1 on pages 8 and 9.)

1. The long-term government bond rate was considered the starting point for a relatively safe rate of return. At December 31, 1993 that rate was 6.5%.
2. An additional premium is added to reflect the long-term historical average difference in rate of total return on New York Stock Exchange stocks over long-term U.S. Government bonds. This represents the expected additional return that could be earned by a typical investor on NYSE common stocks, over the riskless rate earned on long-term U.S. Government bonds. This additional return is a premium paid for the risk inherent in equity investments as compared to a riskless bond investment. At December 31, 1993 that rate was 7.2%.
3. An additional risk premium is added to reflect the risk that a small corporation has over the risk associated with typical New York Stock Exchange Companies. At December 31, 1993 that rate was 5.3%.
4. An additional risk premium is added to reflect the risk that is specific to the particular industry the Company operates in, the intensity of the Company's competition, the stability of the Company's customer base, and the stability/competence of the Company's management and staff. This rate is determined to be 5%.
5. The above capitalization rate is adjusted for the percent that Company net earnings bears to cash flow, (96.6%) and an assured growth rate of earnings (3%).

The capitalization rate derived from the above for the Company at December 31, 1993 is 19.6%.

CONTROL PREMIUM AND MARKETABILITY DISCOUNT

The value of a controlling interest in a corporation is more valuable than that of a minority interest.

The following is a list of some of the more common rights of controlling shareholders:

1. Appoint management
2. Determine management compensation and perquisites
3. Set policy and change the course of business
4. Acquire or liquidate assets
5. Select people with whom to do business and award contracts
6. Make acquisitions
7. Liquidate, dissolve, sell out, or recapitalize the company
8. Sell or acquire treasury shares
9. Register the company's stock for public offering
10. Declare and pay dividends
11. Change the articles and bylaws of the corporation

The most common control premium used in these circumstances is 35%. We believe that this premium is appropriate for C. Kay Cummings Candies, Inc.

Because there is not a ready market for the stock of the Company, we believe a marketability discount of 15% should be applied.

The control premium of 35% and the marketability discount of 15% result in a net adjustment of 20%.

CALCULATIONS USING THE CAPITALIZATION OF EARNINGS METHOD

In summary, we divided the adjusted weighted average after tax earnings of the Company; (\$77,880) by the capitalization rate of 19.6% to arrive at \$397,347. This amount represents the fair market value of the Company's ability to generate earnings.

To this amount is then added the value of certain non-operating assets of \$5,000, (see Appendix C) and the fair market value of the Company's real estate \$692,748 (see Appendix D) net of associated debt of \$260,000 (see Appendix E) to produce the total fair market value of the enterprise as follows:

Appendix A	Weighted average after tax earnings	<u>\$ 77,880</u>
Appendix B	Capitalization rate	<u>19.6%</u>
	Value of the Company's earning capacity	<u>\$397,347</u>
	Add adjustment for control premium and marketability discount (20%)	79,469
Appendix C	Value of non-operating assets	5,000
Appendix D	Value of real estate	692,748
Appendix E	Liability on real estate	<u>(260,000)</u>
TOTAL FAIR MARKET VALUE OF C. KAY CUMMINGS CANDIES, INC. AT DECEMBER 31, 1993		<u>\$914,564</u>

CONCLUSION

It is our considered opinion that the fair market value of 100% of the common stock of C. Kay Cummings Candies, Inc. as of December 31, 1993 is best expressed as:

NINE HUNDRED FOURTEEN THOUSAND FIVE HUNDRED SIXTY FOUR DOLLARS

Pinnock Robbins Posey & Richins

PINNOCK, ROBBINS, POSEY & RICHINS, P.C.

David T. Posey CPA

Report prepared by:
DAVID T. POSEY, CPA

C. KAY CUMMINGS CANDIES, INC.

WEIGHTED AVERAGE AFTER TAX EARNINGS

<u>Year</u>	<u>After Tax Net Earnings</u>	<u>Pretax Net Earnings</u>	<u>Net Earnings Weight</u>	<u>Weighted Total After Tax Earnings</u>
1993	\$ 83,492	\$114,421	5	\$ 417,460
1992	83,293	114,103	4	333,170
1991	96,424	135,047	3	289,273
1990	13,044	16,153	2	26,087
1989	<u>102,217</u>	<u>144,285</u>	<u>1</u>	<u>102,217</u>
	<u>\$378,469</u>	<u>\$524,009</u>	<u>15</u>	<u>\$1,168,207</u>

Five year weighted average after tax net earnings \$1,168,207 = \$77,880
15

C. KAY CUMMINGS CANDIES, INC.

DEVELOPMENT OF CAPITALIZATION RATE

1. Risk-free rate of return	(1)	6.5%
2. Add: Long Horizon expected equity-risk premium	(1)	7.2%
3. Add: Expected small stock premium	(1)	5.3%
4. Add: Other risk - specific to this company	(a)	5.0%
Net cash flow discount rate	(b)	24.0%
Percent that net earnings bears to cash flow	(c)	96.6%
Net earnings discount rate (b) x (c) =	(d)	23.2%
Assured growth in earnings	(e)	3.0%
Net earnings capitalization rate = (d-e)/(1+e)		19.6%

(1) Source - Ibbotson Associates Stock, Bonds, Bills and Inflation 1994 yearbook, see Exhibit B-1

EXHIBIT B-1

KEY VARIABLES FROM
IBBOTSON ASSOCIATES STOCKS, BONDS, BILLS, AND INFLATION 1994 YEARBOOK

<u>Variable Description</u>	<u>Value</u>
Long-term (20 year) U.S. Treasury Bond Yield *	6.5%
Intermediate-term (5 year) U.S. Treasury Note Yield *	5.2%
Short-term (30 day) U.S. Treasury Bill Yield *	2.9%
Long horizon expected equity risk premium: large company stock total returns minus long-term government bond income returns **	7.2%
Intermediate horizon expected equity risk premium: large company stock total returns minus intermediate-term government bond income returns **	7.6%
Short horizon expected equity risk premium: large company stock total returns minus U.S. Treasury bill total returns ***	8.6%
Expected small stock premium: small stock total returns minus large company stock total returns **	5.3%
Expected default premium: long-term corporate bond total returns minus long-term government bond total returns **	0.5%
Expected long-term horizon premium: long-term government bond income returns minus U.S. Treasury bill total returns ***	1.4%
Expected intermediate term horizon premium: intermediate-term government bond income returns minus U.S. Treasury bill total returns **	1.0%

* As of December 31, 1993. Maturities are approximate

** Average based on annual data from 1926 to 1993

*** For U.S. Treasury Bills, the income return and total return are the same

Source: Stocks, Bonds, Bills, and Inflation 1994 Yearbook, Ibbotson Associates, Chicago, Illinois (annually updates work by Roger G. Ibbotson and Rex A. Sinquefeld).

C. KAY CUMMINGS CANDIES, INC.

SCHEDULE OF NON-OPERATING ASSETS

The Company has invested in certain non-operating assets that consists of folding chairs, choir supplies, and jewelry gems. The cost and the estimated fair market value of these non-operating assets is as follows:

<u>Description</u>	<u>Historical Cost</u>	<u>Estimated Fair Market Value</u>
Chairs, and Choir supplies	\$ 4,804	\$ -
Jewelry gems	<u>8,500</u>	<u>5,000</u>
TOTALS	<u>\$13,304</u>	<u>\$ 5,000</u>

RealData

Wardley
corporation

**Better
Homes®**
and Gardens



PROPERTY
EVALUATION
SYSTEM



J. B. Wahsburn
Associate Broker



WARDLEY BETTER HOMES & GARDENS®

MARKET ANALYSIS

SUBJECT PROPERTY

2057 East 3300 South

prepared for:

**David Posey
136 East South Temple
Suite # 2250
S. L. C., Utah 84111**

APPENDIX D

NARRATIVE:

The purpose of this market analysis is to determine the value of the Cummings Candy building located at 2057 East 3300 South. The determination of value deals only with the building and does not include the land. The property is located in an upper east side commercial area of the Salt Lake Valley, and the building could be adapted for any number of business uses.

The building is a masonry structure built in 1984 and includes approximately 8247 square feet on the main floor and 7407 square feet in the basement. The main floor includes the retail store, as well as office and production areas and a large garage area. The basement is primarily used for storage, but could be used for production. The building was designed and built to house the Cummings Candy operation, and that is its highest and best use, however, it could easily be converted, and would be suitable for many types of commercial and/or retail uses.

In looking at, and analyzing the comparable properties that were available, it was determined that an accurate per square foot cost would be \$105 per square foot. This cost includes the land, which we are excluding from this evaluation and the ratio is 20% land and 80 % building, making the per square foot cost used for this evaluation \$84 per square foot.

Using the main floor square foot figure of 8247 square feet, and the figure of \$84 per square foot, without including the land, that brings the market value of the building to *****

\$ 692,748.00

This determination of value is given by J. B. Washburn, REALTOR, and Associate Broker, this 18th day of May, 1994.

A handwritten signature in black ink, appearing to read 'J. B. Washburn', enclosed within a large, loopy oval flourish.

APPENDIX D

PROPERTY INFORMATION

Parcel	16273040300000	Property Type	500	Year Built	
Building Style		Eff. Year Built	0	Zoning	2000
Site Name				Square Feet	
Site Address	2057 E 3300 S			Sale Date	/
Site City	Salt Lake City	State	UT	Zipcode	8410

OWNERSHIP INFORMATION

Owner	CUMMINGS, CLYDE K & OLETTA J (JT)		Telephone #	80148510
Contact	Clyde Cummings		Owner Occupied	Y
Address	2057 E 3300 S		Zipcode	84109
City	Salt Lake City	State	UT	

PROPERTY TAX INFORMATION

Building Value	\$365300	Total Acres	0.40	93 Taxes	7548.8
Land Value	\$90300	Mortgage Holder	0000	92 Taxes	7991.3
Total Value	\$455600			Tax Rate	17441
Subdivision					
Legal Description	BEG 1181.4 FT N & 2094.41 FT W FR S 1/4 COR OF SEC 27, T 1S R 1E, S L M; W 115.81 FT; N 6°48' E TO VERDANT HEIGHTS #3; 95.69 FT TO A PT N FR BEG; S 168.75 FT TO BEG. 0.40 AC M OR L				

APPENDIX D

EXTERIOR FRONT VIEW

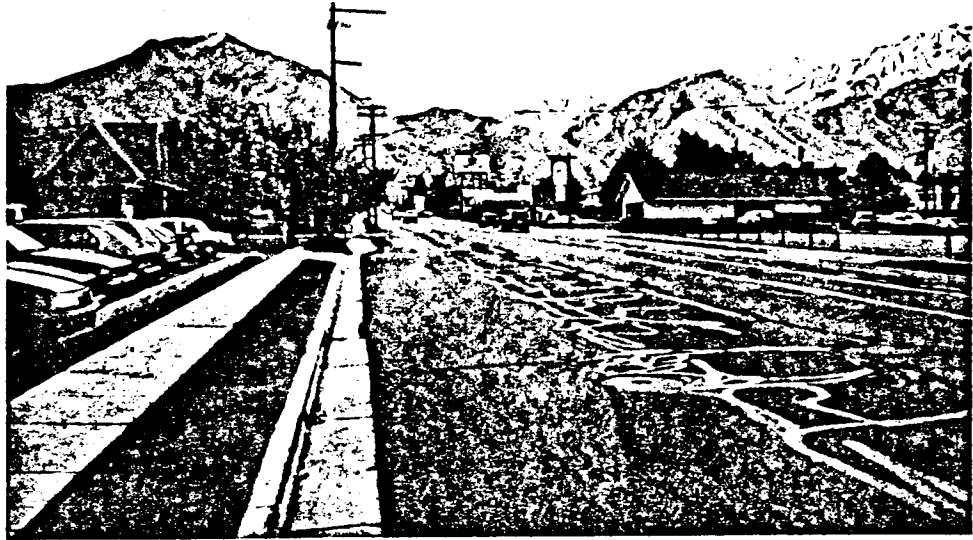


EXTERIOR FRONT VIEW

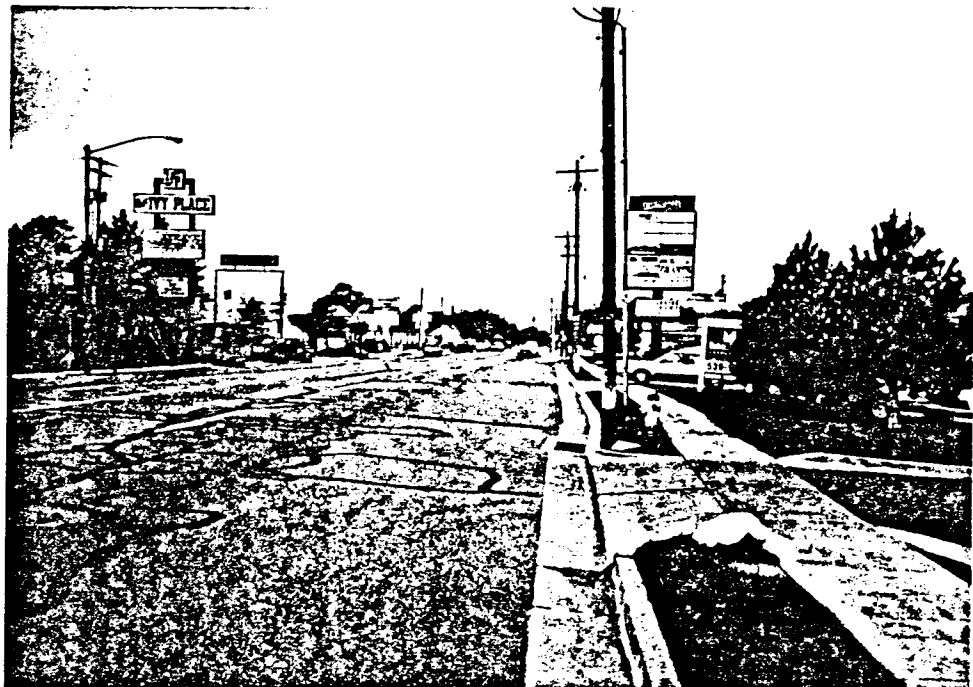


APPENDIX D

FRONT STREET VIEW
LOOKING EAST



FRONT STREET VIEW
LOOKING WEST



APPENDIX D

FRONT RETAIL STORE
EAST VIEW

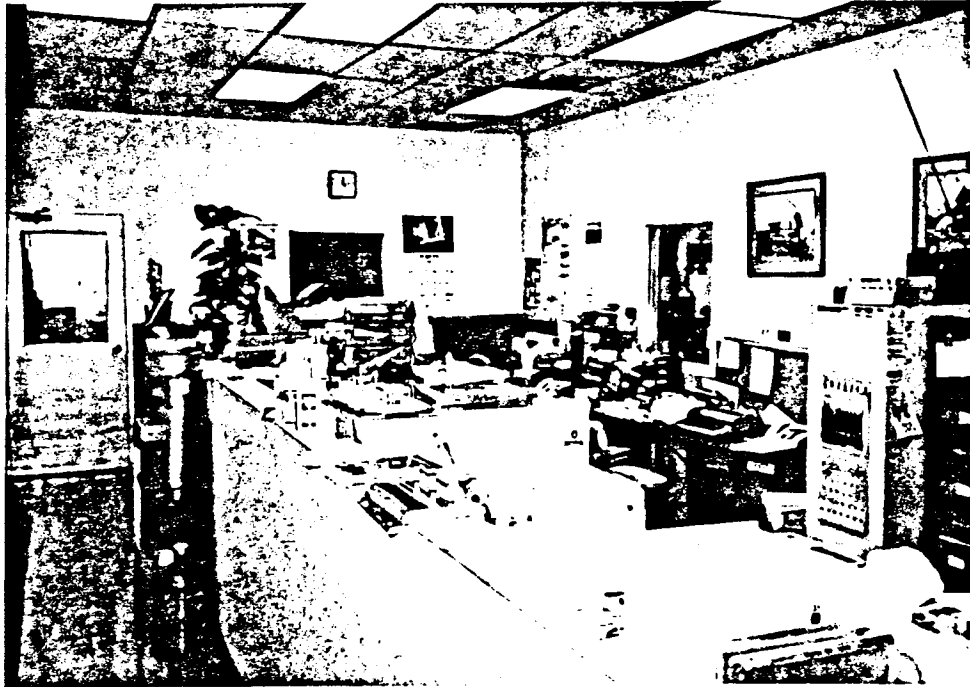


FRONT RETAIL STORE
WEST VIEW



APPENDIX D

OFFICE SPACE

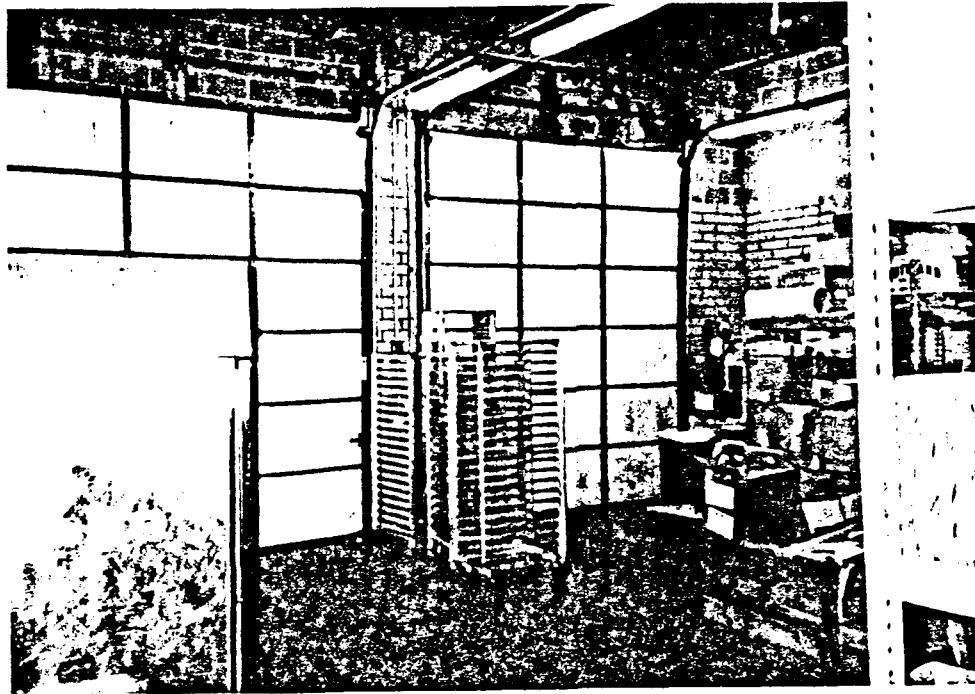


PACKING AREA

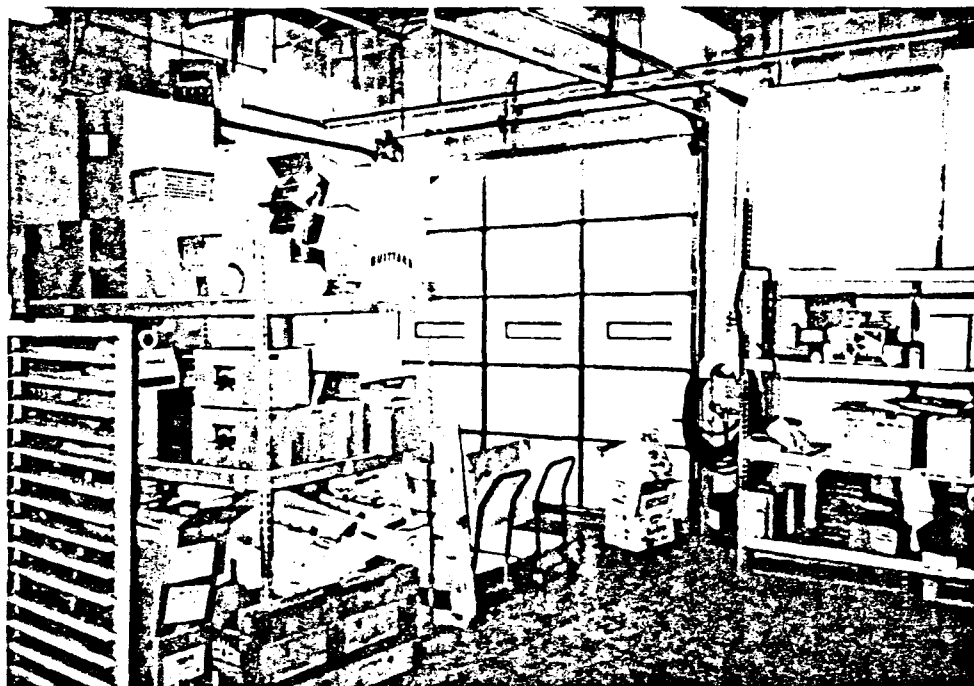


APPENDIX D

GARAGE AREA
FRONT VIEW



GARAGE AREA
REAR VIEW



APPENDIX D

4876 S 300 WEST

ML#	1004420
TYPE	1CFS
LIST PRICE	1239000
SULL PRICE	1310000
LIST OFFICE	11251
AREA	14
LOCATE	1SW
NS COORD	14876
EW COORD	1300
STATUS	1S
TAX ID	121-12-101-003
ACFEE	11.31
ZONING	1MGC
YEAR BUILT	11951
BUILDING SOFT	13700
OFFICE SOFT	
CEILING HEIGHT	120
DOLF HEIGHT	
DOCK DOORS	
GRND LEVEL DFC	10
#PARL.	115
SALE INCLUDES-1	1ELLG
SALE INCLUDES-2	1LAND
SALE INCLUDES-3	
HEAT-1	1GAS
COOL-1	1CLNTL
GSI	
GDI	
NOI	
ANNUAL EXPENSES	
ELECTRIC-1	1COM
GAS-1	1COM
TAXES	12000
CONTRACT DATE	
SOLD DATE	104/17/93
SOLD TERMS	1CLNTL
DAYS ON MARKET	126

APPENDIX D

** A Status Subtotals (4 found) **

	List Price
i:	1250000
pw:	250000
ed:	407500
vg:	623750

** U Status Subtotals (1 found) **

	List Price
i:	225000
pw:	225000
ed:	225000
vg:	225000

** S Status Subtotals (2 found) **

	List Price	Sale Price
i:	289000	310000
pw:	239000	289000
ed:	264000	299500
vg:	284000	299500

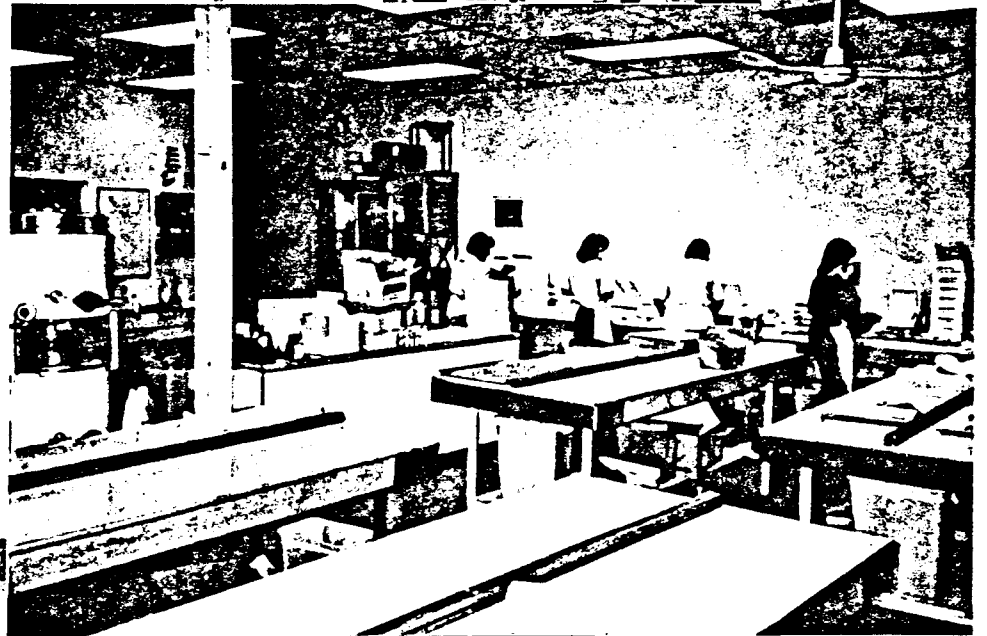
** Totals From All Statuses: (7 found) **

	List Price	Sale Price
i:	1250000	310000
pw:	225000	289000
ed:	289000	299500
vg:	464000	299500

omments:

APPENDIX D

PRODUCTION AREAS



APPENDIX D
COMMERCIAL

PROPERTY INFORMATION

Parcel	16273040300000	Property Type	500	Year Built	1
Building Style		Eff. Year Built	0	Zoning	2000
Site Name				Square Feet	1
Site Address	2057 E 3300 S			Sale Date	/ /
Site City	Salt Lake City	State	UT	Zipcode	84109

OWNERSHIP INFORMATION

Owner	CUMMINGS, CLYDE K & OLETTA J (JT)	Telephone #	4851031
Contact	Clyde Cummings	Owner Occupied	Y
Address	2057 E 3300 S	Zipcode	84109
City	Salt Lake City	State	UT

PROPERTY TAX INFORMATION

Building Value	\$365300	Total Acres	0.40	93 Taxes	7548.83
Land Value	\$90300	Mortgage Holder	0000	92 Taxes	7991.34
Total Value	\$455600	Map Number	1627311	Tax Rate	174410
Subdivision				Census Tract	1103

COMMERCIAL

Commercial Use		Heating Type	
Commercial Class		Percent Heat	1
Number of Stories	0	Heat Type 2	
Exterior Wall Type		Percent Heat 2	1
Replacement Cost	0	Central A/C	
Less Depreciation	0	Percent Sprinkler	1
Main Floor Area	0	Map Number	1627311
Perimeter	0	Misc. Structure	
Historic Grade		Structure Value	1
Historic Grade		Amenity	
Overall Grade		Amenity Size	1
Exterior Condition		Amenity Unit	
Exterior Condition		Amenity 2	
Overall Condition		Amenity 2 Size	1
		Amenity 2 Unit	

LOT		NEIGHBORHOOD		SERVICES	
Square Feet	***. **	Neighborhood Code	7950	Water	1
Frontage	0	Neighborhood Type		Sewer	1
Depth	0	Traffic		Power	1
Lot Type		Street Type		Fuel	1
Standard Lot Size		Street Finish	P	Telephone	1
Subdivision Date				Curb/Gutter	1
Acres	0.40			Sidewalk	1
Topography		DETACHED STRUCTURES			
Influence Type		Structures		Measure	1
Influence Effect		Description		Units	
Influence		Annual Depreciation	0	Eff Yr Blt	1
Influence Adj %	0				
Assessment Class					

APPRAISAL

Assessment District	17	Reappraisal Year	95
Assessment Class-1	NE	Last Update	09/11/95
Book Number	5480	Info Source	
Page Number	1838	Entrance	
Assessment Appeal Date	000000	Mortgage Holder	0000

APPENDIX D
COMMERCIAL

Tax Rate

1741

Legal Description BEG 1181.4 FT N & 2094.41 FT W FR S 1/4 COR OF SEC 27, T 1
R 1E, S L M; W 115.81 FT; N 6°48' E TO VERDANT HEIGHTS #3;
95.69 FT TO A PT N FR BEG; S 168.75 FT TO BEG. 0.40 AC M L

TAT:R,C,S AREA:1-11 TYPE:CPS BLDG:2000+
 SALT LAKE CITY BOARD OF REALTORS COMPARATIVE MARKET ANALYSIS

prepared by: J.E. WASHBURN

05/13/94

Page: 1

	4874 S STATE STREET	4100 S STATE STREET	4803 S STATE STREET
LN#	1324954	1323807	1324956
YCE	1CPS	1CPS	1CPS
IST PRICE	1250000	1495000	1500000
OLD PRICE	1	1	1
IST OFFICE	1050201	1050201	1050201
FEA	14	14	14
DCATE	1SE	1SE	1SE
S COORD	14874	14100	14868
N COORD	1100	1100	1100
TATUS	1A	1A	1A
AX ID	122-07-105-015	116-1-352-016	122-07-105-014
CRS	1.11	1.31	1.44
ONING	1CDC	1C-2	1CDC
EAR BUILT	11904	11970	11907
BUILDING SQFT	13839	111500	115000
OFFICE SQFT	1	1	1
CEILING HEIGHT	112	1	112
DOOR HEIGHT	1	1	18.0
DOOR DOORS	1	1	1
FIND LEVEL DFC	13	1	11
PART	14	130	130
ARE INCLUDES-1	1BLDG	1BLDG	1BLDG
ARE INCLUDES-2	1BUSN	1LAND	1BUSN
ARE INCLUDES-3	1LAND	1LAND	1LAND
EAT-1	1GAS	1GAS	1GAS
COL-1	1CENTL	1EVAPP	1EVAPP
SI	1	1	1
DI	1	1	1
DI	1	1	1
ANNUAL EXPENSES	1	1	1
LECTRIC 1	1COM	1COM	1COM
AS-1	1COM	1COM	1COM
AXES	11394	15930	13794
CONTRACT DATE	1	1	1
OLD DATE	1	1	1
OLD TERM	1	1	1
AVE CL. PER ET	1	1	1

APPENDIX D

	1373 W 9000 SOUTH	997 E 3900 SOUTH	1370 S 2100 EAST
ML#	1320105	1313888	1318584
TYPE	1CRS	1CRS	1CRS
LIST PRICE	11250000	1225000	1289000
SOLD PRICE	1	1	1289000
LIST OFFICE	1050201	10869	11002
AREA	19	14	13
LOCATE	1SW	1SE	1SE
NS COORD	19000	12900	11370
EW COORD	11373	1997	12100
STATUS	1A	1U	1S
TAX ID	127-03-426-087	116-32-329-018	116-15-101-23
ACRES	11.54	1.48	1.35
ZONING	1SC-2	1R-2-8	1B-3
YEAR BUILT	11987	11900	11979
BUILDING SQFT	117280	14140	13720
OFFICE SQFT	1	1	1
CEILING HEIGHT	110	1	112
DOCK HEIGHT	1	1	1.0
DOCK DOORS	1	1	10
GRND LEVEL DRS	1	1	13
#PARK	1105	1	125
SALE INCLUDES-1	1BLDG	1BLDG	1BLDG
SALE INCLUDES-2	1LAND	1LAND	1LAND
SALE INCLUDES-3	1	1	1
HEAT-1	1GAS	1GAS	1GAS
COOL-1	1CENTL	1WNDW	1CENTL
GSI	1150996	1	10
G01	1140446	1	10
NOI	1145446	1	10
ANNUAL EXPENSES	1	1	10
ELECTRIC-1	1SEP	1COM	1COM
GAS-1	1SEP	1COM	1COM
TAXES	119504	11335	14270
CONTRACT DATE	1	1	1
SOLD DATE	1	1	112/16/93
SOLD TERMS	1	1	1OFFER
DAYS ON MARKET	1	1	12

Original Search Criteria:

STAT:A,D,S AREA:1-11 TYPE:CRS BLDGF:2000+
WARDLEY BH & G 266-4663 05/18/94 J.B. WASHBURN

SALT LAKE BOARD OF REALTOR COMMERCIAL/IND/BUSINESS 05/18/94 10:09 AM
324954 Ad 4874/S/STATE STREET Type CRS LP \$ 250000 Ofc 05020
Area 4 Locato SE NS 4874 EW 100 Lse Pr \$ Pr Per / Stat
County SALT LAKE Tax ID 22-07-105-015 Acres .11 Zoning CDC #1
City 12/MURRAY Lot 47X102 Yr Blt 1904 Vol/Pg /

----- GENERAL INFORMATION -----

BusType RETAIL BldgType MASONRY WALL BldgSF 3839 GSI \$
Heat GAS / Ceil Ht 12 #Park 4 Min SF 3839 GOI \$
Cool CENTL/ Dock Ht #Volts 220 Ofc SF An Exp \$
Elec COM/ Dock Drs #Amps NOI \$
Gas COM/ GLvl Drs 3 Phase Sale Includes BLDG/BUSN/LAND
Landlord BLDTX/FIREI/FULL / / / Lse Type /
ncl HVAC / / / / / / / / / / / / / / / /
Remarks RETAIL CONSUME SHOP. PRICE TO INCLUDE ENTIRE INVENTORY, INCLUDING
RENTAL ATTIRE. SUPER LOCATION IN THE HEART OF MURRAY GREAT INVESTMENT OPPOR
UNITY.

----- LISTING OFFICE INFORMATION -----

pptThru L/ Name HAL ERICKSON Phone 568-5267 BAC 3 SAC 0
/Office 050201 WARDLEY BH & G (BRAN Phone 255-4663 FAX 561-5631 Sub Agcy
/Agent BRIBAL HAL ERICKSON Phone 568-5267 Show Instr APP/
or-Agent Phone Possession ARR
Contract Type ERS Photo TAKE

----- FINANCIAL INFORMATION -----

Terms CONV /BLRFI/ / / Other Terms
own Payment \$ Taxes \$ 1394 Pymt Type FIX Incl PI
Bal \$ 42000 1Pymt \$ 517 1Rate 8.000% #Loans 1 Loan PRIV
Bal \$ 2Pymt \$ 2Rate % Exist Mortgagee MURRAY PHAR

----- CHANGE INFORMATION -----

Time Clause Reinstated Open House

(C) NLS INFORMATION DEEMED RELIABLE BUT NOT GUARANTEED

Completed

D-29

SALT LAKE BOARD OF REALTOR COMMERCIAL/IND/BUSINESS 05/18/94 10:09 AM
 # 014000 Ac 4868/S/STATE STREET Type CRS LP \$ 500000 Ofc 0502
 Area 4 Locate SE NS 4868 EW 100 Lse Pr \$ Fr Per / Stat
 County SALT LAKE Tax ID 22-07-105-014 Acres .44 Zoning CDC #1
 City 12/MURRAY Lot 48X160XIRR Yr Blt 1937 Vol/Pg /

----- GENERAL INFORMATION -----

BldgType RETAIL BldgType MASONRY WALL BldgSF 15000 GSI \$
 Heat GAS / Ceil Ht 12 #Park 33 Min SF 2726 GOI \$
 Cool EVAPR/ Dock Ht 8.0 #Volts Ofc SF An Exp \$
 Elec COM/ Dock Drs #Amps NOI \$
 Gas COM/ GLvl Drs 1 Phase Sale Includes BLDG/BUSN/LAND
 Landlord ELDTX/FIREI/GARBG/HEAT /JANIT/POWER Lse Type /
 SEWER/SNOWR/WATER/ / / /

Incl HAND/HVIS/ / / / / / / / / / / / / / / /

Remarks 2 RENTALS ON STATE STREET BALL ROOM DANCE HALL IN REAR BALLET INST.
 EA OVER \$5,000 SQ FT OF OPEN SPACE WITH HARDWOOD FLOORS, VERY NICE PART OF
 MURRAY MULTIPLE USES.

----- LISTING OFFICE INFORMATION -----

ApptThru L/ Name HAL ERICKSON Phone 568-5267 BAC 3 SAC 0
 L/Office 050201 WARDLEY BH & G (BRAN Phone 255-4663 FAX 561-5631 Sub Agcy
 L/Agent ERIHAL HAL ERICKSON Phone 568-5267 Show Instr APP/ /
 Co-Agent Phone Possession ARR
 Contract Type ERS Photo TAKE

----- FINANCIAL INFORMATION -----

Terms CONV /CLRFI/ / / Other Terms
 Down Payment \$ Taxes \$ 3794 Pymt Type Incl PI
 Bal \$ 112000 1Pymt \$ 2600 1Rate 10.500% #Loans Loan CONV
 Bal \$ 2Pymt \$ 2Rate % Exist Mortgagee FIRST SEC

----- CHANGE INFORMATION -----

Time Clause Reinstated Open House

(c) MLS INFORMATION DEEMED RELIABLE BUT NOT GUARANTEED

Completed

SALT LAKE BOARD OF REALTOR COMMERCIAL/IND/BUSINESS 05/18/97 10:00 AM
 # 020105 Ad 1370/W/9000 SOUTH Type CRS LP \$ 1250000 Ofc 05020
 Area 3 Locate SW NS 9000 EW 1370 Lse Pr \$ Pr Per OTH/ Stat
 County CANYON Tax ID 27-03-426-087 Acres 1.54 Zoning CC-2 #1
 City 20 WESTJORDAN Lot 109 X 380 X 318 IRR Yr Blt 1987 Vol/Pg /

----- GENERAL INFORMATION -----

BldgType RETAIL BldgType MASONRY BldgSF 17280 GSI \$ 15095
 Heat GAS / Ceil Ht 10 #Park 105 Min SF 1080 GOI \$ 14344
 Cool CENTIL Dock Ht #Volts 208 Ofc SF An Exp \$
 Elec SEP/ Dock Drs #Amps 37441 NOI \$ 14344
 Gas SEP/ GLvl Drs Phase T Sale Includes BLDG/LAND/
 Landlord / / / / / Lse Type BLDG/
 / / / / /

Incl FDRN/HAND/HVIS/SIGN/TENI/ / / / / / / / / / /
 Remarks NEIGHBORHOOD SHOPPING CENTER 16 UNIT 1080 SQ FT EACH EASILY RENTED
 IN VERY ACTIVE SHOPPING AREA WITH ADDITIONAL PARKING AVAILABLE VERY
 ATTRACTIVE AND MUCH UTILIZED.

----- LISTING OFFICE INFORMATION -----

ApptThru L/ Name HAL ERICKSON Phone 568-5267 BAC 3 SAC 0
 L/Office 050201 WARDLEY BH & G (BRAN Phone 255-4663 FAX 561-5601 Sub Agcy
 L/Agent ERIHAL HAL ERICKSON Phone 568-5207 Show Instr APP/ /
 Co-Agent Phone Possession ARRANGE
 Contract Type ERS Photo TAKE

----- FINANCIAL INFORMATION -----

Terms CONV /OFFER/GLRFI/ / Other Terms FLEXIBLE
 Down Payment \$ Taxes \$19504 Pymt Type Incl PIT
 1Bal \$ 367000 1Pymt \$ 9960 1Rate 10.325% #Loans 1 Loan CONV
 2Bal \$ 2Pymt \$ 2Rate % Exist Mortgagee UNITED SAVINGS

----- CHANGE INFORMATION -----

Time Clause Reinstated Open House

(c) MLS INFORMATION DEEMED RELIABLE BUT NOT GUARANTEED

Completed

SALT LAKE BOARD OF REALTOR COMMERCIAL/IND/BUSINESS 03/18/94 10:09 AM
 # 010986 Ad 997/E/3000 SOUTH Type CRS LP \$ 225000 Ofc 0869
 Area 4 Acre SE NS 2900 EW 997 Lse Pr \$ Pr Per / Stat
 County SALT LAKE Tax ID 16-32-329-018 Acres .48 Zoning R-2-B #1
 City 20700 COUNTY Lot 153X137 Yr Blt 1900 Vol/Pg 040/ 395

----- GENERAL INFORMATION -----

BldgType STUCCO BldgSF 4140 GSI \$
 Heat GAS / Ceil Ht #Park Min SF GDI \$
 Cool WNDW / Deck Ht #Volts Ofc SF An Exp \$
 Elec COM/ Deck Drs #Amps NOI \$
 Gas COM/ GLvl Drs Phase Sale Includes BLDG/LAND/
 Landlord / / / / / / Lse Type /

Incl RVIS/KITCH/LIVN/ / / / / / / / / / / / / / / /
 Remarks EXCELLENT OPPORTUNITY FOR COMMERCIAL USE. ZONING VARIANCE REQUIRED.
 BE SOLD WITH ADJOINING DUPLEX 992 EAST. 3825 SOUTH. ADD'L .23 ACRE. SO FT.
 S APPROXIMATE. BUYER SHOULD VERIFY NEAR ST MARKS HOSPITAL. APPROX AGE

----- LISTING OFFICE INFORMATION -----

ApptThru L/ Name STEVEN FEDER Phone 483-5572 BAC 3 SAC 0
 L/Office 0869 PRUDENTIAL PRESTIGE Phone 288-9800 FAX 288-9881 Sub Agcy
 L/Agent FEDSTE STEVEN B. FEDER Phone 483-5572 Show Instr APP/ /
 Co-Agent HARMAR BILL & MARGE HARVEY Phone 583-8007 Possession ARR
 Contract Type ERG Photo TAKE

----- FINANCIAL INFORMATION -----

Terms CONV / / / / Other Terms
 Down Payment \$ Taxes \$ 1335 Pymt Type Incl
 Bal \$ 1Pymt \$ 1Rate % #Loans Loan
 Bal \$ 2Pymt \$ 2Rate % Exist Mortgagee

----- CHANGE INFORMATION -----

Open House

----- COMPARABLE INFORMATION -----

(c) MLS INFORMATION DEEMED RELIABLE BUT NOT GUARANTEED

Completed

SALT LAKE BOARD OF REALTORS COMMERCIAL/IND/BUSINESS 05/18/94 10:05 AM
 # 113554 AS 1370/S/2100 EAST Type CRS LP \$ 289000 Ofc 100E
 Area 3 locate SE NS 1370 EW 2100 Lse Pr \$.000 Pr Per / Stat
 County SALT LAKE Tax ID 16-15-101-23 Acres .35 Zoning B-3 #1
 City SALT LAKE Lot 114 X 150 Yr Blt 1979 Vol/Pg /

----- GENERAL INFORMATION -----

BldgType BldgType BLOCK BldgSF 3720 GSI \$
 Heat GAS / Ceil Ht 12 #Park 25 Min SF GDI \$
 Cool CENTL/EVAPR Dock Ht .0 #Volts 110 Ofc SF An Exp \$
 Elec COM/ Dock Drs 0 #Amps 220 NOI \$
 Gas COM/ GLvl Drs 3 Phase S Sale Includes BLDG/LAND/
 Landlord / / / / / Lse Type /

Incl / / / / / / / / / / / / / / /
 Remarks BLEYL & SONS CARPET, BUILDING AND LAND ONLY. PREFER CONTRACT SALE
 20% DOWN. GREAT RETAIL LOCATION. OFF STREET PARKING. LARGE WAREHOUSE
 IN REAR.

----- LISTING OFFICE INFORMATION -----

ApptThru L/ Name ADAM NASH Phone 580-1428 BAC 3 SAC 0
 L/Office 1006 STEPHENS-NACCARATO, Phone 268-4450 FAX 268-4879 Sub Agcy
 L/Agent NABADA ADAM NASH Phone 277-3024 Show Instr APP/ /
 Co-Agent Phone Possession
 Contract Type ERS Photo TAKE

----- FINANCIAL INFORMATION -----

Terms SLRFIX / / / Other Terms CONTRACT PREFERRED
 Down Payment \$ 57000 Taxes \$ 4270 Pynt Type FIX Incl
 1Bal \$ 30000 1Pynt \$ 986 1Rate % #Loans 1 Loan CONV
 2Bal \$ 2Pynt \$ 2Rate % Exist Mortgagee

----- CHANGE INFORMATION -----

Open House

----- COMPARABLE INFORMATION -----

Sold Date 12/16/93 Sold Price \$ 2890
 Sold Terms OFFER POC \$ 0 S/Agent BERKEY KAY (B)ARNOLD
 Days on Market 2 S/Ofc 0748 KAY BERGER

(C) MLS INFORMATION DEEMED RELIABLE BUT NOT GUARANTEED Completed

SHEL LAND BOARD OF REALTOR COMMERCIAL/IND/BUSINESS 05/18/94 10:09 AM
 # 004420 AD 4878/S/300 WEST Type CRS LP \$ 209000 Ofc 1252
 Area 4 Locate SW NS 4878 EW 300 Lse Pr \$ Pr Per OTH/ Stat
 County CALPLAKE Tax ID 21-12-202-008 Acres 1.31 Zoning MDC #1
 City 12/MURRAY Lot IRRX810 Yr Blt 1951 Vol/Pg 030/ 383

GENERAL INFORMATION

BldgType BldgType BLOCK BldgSF 3700 GSI \$
 Heat BAC / Ceil Ht 20 #Park 15 Min SF GOI \$
 Cool CENTL/ Dock Ht #Volts Ofc SF An Exp \$
 Elec COM/ Dock Drs #Amps NOI \$
 Gas COM/ GLvl Drs 3 Phase Sale Includes BLDG/LAND/
 Landlord / / / / / Lse Type /

Incl HVIS/RRMS/SECF/ / / / / / / / / / / / / / / /
 Remarks FREEWAY EXPOSURE OWNER FINANCING NEWLY REMODEL OFFICE&SHOP SELLER
 MOTIVATED

LISTING OFFICE INFORMATION

ApptThru L/ Name RANDY FLANDERS Phone 272-8811 BAC 3% SAC 3%
 L/Office 1252 CHOICE-REALTY BROKER Phone 268-2666 FAX 268-4269 Sub Agcy
 L/Agent FLARAN RANDY FLANDERS Phone 599-2552 Show Instr APP/ /
 Co-Agent CORVON VONDA CORNABY-FLANDE Phone 272-8811 Possession ARR
 Contract Type ERS Photo TAKE

FINANCIAL INFORMATION

Terms / / / / Other Terms
 Down Payment \$ Taxes \$ 2000 Pymt Type Incl
 1Bal \$ 1Pymt \$ 1Rate % #Loans Loan
 2Bal \$ 2Pymt \$ 2Rate % Exist Mortgagee SBA

CHANGE INFORMATION

Open House

COMPARABLE INFORMATION

Sold Date 04/27/93 Sold Price \$ 3100
 Sold Terms SLRPI FOC \$ 0 S/Agent FLARAN RANDY FLANDERS
 Days on Market 28 S/Ofc 1252 CHOICE-REALTY BROKER
 (c) MLC INFORMATION DEEMED RELIABLE BUT NOT GUARANTEED Completed

C. KAY CUMMINGS CANDIES, INC.

SCHEDULE OF BONDS PAYABLE TO
FIRST SECURITY BANK
(BOND SECURED BY REAL ESTATE AT
2057 EAST 3300 SOUTH, SALT LAKE CITY, UTAH)

On December 13, 1984 C. Kay Cummings Candies, Inc. entered into a long-term debt agreement with First Security Bank for the construction of its factory and retail space at 2057 East 3300 South, Salt Lake City, Utah. The Company borrowed \$450,000, repayable as follows:

<u>Payment Date</u>	<u>Principal Payment Amount</u>
June 1, 1985	\$ 5,000
Dec. 1, 1985	5,000
June 1, 1986	5,000
Dec. 1, 1986	10,000
June 1, 1987	10,000
Dec. 1, 1987	10,000
June 1, 1988	10,000
Dec. 1, 1988	10,000
June 1, 1989	10,000
Dec. 1, 1989	10,000
June 1, 1990	10,000
Dec. 1, 1990	10,000
June 1, 1991	10,000
Dec. 1, 1991	15,000
June 1, 1992	15,000
Dec. 1, 1992	15,000
June 1, 1993	15,000
Dec. 1, 1993	15,000
June 1, 1994	15,000
Dec. 1, 1994	<u>245,000</u>
TOTAL	<u>\$450,000</u>

The interest rate is a variable rate, which is (85%) of the prime commercial lending rate of First Security Bank of Utah.

The principal balance payable at December 31, 1993 was \$260,000.

C. KAY CUMMINGS CANDIES, INC.

ASSUMPTIONS AND LIMITING CONDITIONS

This valuation is subject to the following assumptions and limiting conditions:

1. Information, estimates, and opinions contained in this report are obtained from sources considered to be reliable. However, we assume no liability for such sources.
2. The Company and its representatives warranted to us that the information they supplied was complete and accurate to the best of their knowledge and that the financial statement information taken from the Company's federal corporate tax returns reflects the Company's results of operations and financial condition in accordance with tax accounting law. Information supplied by management has been accepted as correct without further verification, and we express no opinion on that information.
3. Possession of this report, or a copy thereof, does not carry with it the right of publication of all or part of it, nor may it be used for any purpose by anyone but the client without the previous written consent of the client or us and, in any event, only with proper attribution.
4. The various estimates of value presented in this report apply to this valuation only and may not be used out of the context presented herein. This valuation is valid only for the purpose or purposes specified herein.
5. This valuation reflects facts and conditions existing at the valuation date. Subsequent events have not been considered, and we have no obligation to update our report for such events and conditions.
6. This report was prepared by David T. Posey, CPA. Mr. Posey does not have any present or contemplated future interest in C. Kay Cummings Candies, Inc., and personal interest with respect to the parties involved, or any other interest that might prevent us from performing an unbiased valuation. Our compensation is not contingent on an action or event resulting from the analyses, opinions, or conclusions in, or the use of, this report.
7. The historical financial information presented at Exhibits G, H, I, J AND K are included solely to assist in the development of the value conclusion presented in this report, and it should not be used to obtain credit or for any other purpose. Because of the limited purpose of this presentation, it may be incomplete and contain departures from generally accepted accounting principles. We have not audited, reviewed, or compiled this presentation and express no assurance on it.

From the Corporate Tax Returns for the Year Ended

December 31, 1991			December 31, 1990			December 31, 1989		
As Reported	Adjustment to Normalize	Normalized Amounts	As Reported	Adjustment to Normalize	Normalized Amounts	As Reported	Adjustment to Normalize	Normalized Amounts
\$1,135,807	\$ -	\$1,135,807	\$1,125,527	\$ -	\$1,125,527	\$1,446,607	\$ -	\$1,446,607
<u>389,263</u>	<u>-</u>	<u>389,263</u>	<u>562,735</u>	<u>-</u>	<u>562,735</u>	<u>650,542</u>	<u>-</u>	<u>650,542</u>
<u>746,544</u>	<u>-</u>	<u>746,544</u>	<u>562,792</u>	<u>-</u>	<u>562,792</u>	<u>796,065</u>	<u>-</u>	<u>796,065</u>
<u>4,513</u>	<u>-</u>	<u>4,513</u>	<u>735</u>	<u>-</u>	<u>735</u>	<u>7,559</u>	<u>-</u>	<u>7,559</u>
<u>751,057</u>	<u>-</u>	<u>751,057</u>	<u>563,527</u>	<u>-</u>	<u>563,527</u>	<u>803,624</u>	<u>-</u>	<u>803,624</u>
26,000	-	26,000	26,000	-	26,000	26,000	-	26,000
101,131	-	101,131	150,432	-	150,432	148,937	-	148,937
1,942	-	1,942	2,285	-	2,285	8,167	-	8,167
749	-	749	29,252	-	29,252	1,198	-	1,198
72,706	-	72,706	74,354	-	74,354	127,307	-	127,307
31,193	-	31,193	56,782	-	56,782	37,676	-	37,676
4,383	-	4,383	465	-	465	4,599	-	4,599
5,768	9,331	15,099	6,828	-	6,828	19,697	10,000	29,697
3,645	-	3,645	6,032	-	6,032	8,920	-	8,920
-	-	-	-	-	-	-	-	-
-	-	-	-	-	-	-	-	-
<u>358,945</u>	<u>217</u>	<u>359,162</u>	<u>194,944</u>	<u>-</u>	<u>194,944</u>	<u>266,838</u>	<u>-</u>	<u>266,838</u>
<u>606,462</u>	<u>9,548</u>	<u>616,010</u>	<u>547,374</u>	<u>-</u>	<u>547,374</u>	<u>649,339</u>	<u>10,000</u>	<u>659,339</u>
144,595	(9,548)	135,047	16,153	-	16,153	154,285	(10,000)	144,285
-	6,752	6,752	-	808	808	-	7,214	7,214
<u>-</u>	<u>31,870</u>	<u>31,870</u>	<u>-</u>	<u>2,302</u>	<u>2,302</u>	<u>-</u>	<u>34,854</u>	<u>34,854</u>
<u>-</u>	<u>38,623</u>	<u>38,623</u>	<u>-</u>	<u>3,109</u>	<u>3,109</u>	<u>-</u>	<u>42,068</u>	<u>42,068</u>
<u>\$ 144,595</u>	<u>\$(48,171)</u>	<u>\$ 96,424</u>	<u>\$ 16,153</u>	<u>\$(3,109)</u>	<u>\$ 13,044</u>	<u>\$ 154,285</u>	<u>\$(52,068)</u>	<u>\$ 102,217</u>

From the Corporate Tax Returns

December 31, 1991			December 31, 1990			December 31, 1989		
<u>As Reported</u>	<u>Normaliz- ation adj.</u>	<u>Normalized Amounts</u>	<u>As Reported</u>	<u>Normaliz- ation adj.</u>	<u>Normalized Amounts</u>	<u>As Reported</u>	<u>Normaliz- ation adj.</u>	<u>Normalized Amounts</u>
\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 50,529	\$ -	\$ 50,529
-	-	-	-	-	-	-	-	-
229,298	-	229,298	149,358	-	149,358	194,347	-	194,347
-	-	-	-	-	-	-	-	-
60,200	-	60,200	75,961	-	75,961	21,981	-	21,981
-	-	-	-	-	-	-	-	-
264,768	-	264,768	252,437	-	252,437	245,430	-	245,430
(226,295)	-	(226,295)	(216,964)	-	(216,964)	(210,135)	-	(210,135)
-	-	-	-	-	-	-	-	-
-	-	-	-	-	-	-	-	-
-	-	-	-	-	-	-	-	-
<u>13,304</u>	<u>-</u>	<u>13,304</u>	<u>13,304</u>	<u>-</u>	<u>13,304</u>	<u>13,304</u>	<u>-</u>	<u>13,304</u>
<u>\$341,275</u>	<u>\$ -</u>	<u>\$341,275</u>	<u>\$274,096</u>	<u>\$ -</u>	<u>\$274,096</u>	<u>\$315,456</u>	<u>\$ -</u>	<u>\$315,456</u>
\$102,308	\$ -	\$102,308	\$141,731	\$ -	\$141,731	\$ 54,222	\$ -	\$ 54,222
-	-	-	-	-	-	-	-	-
-	-	-	-	-	-	-	-	-
-	-	-	-	-	-	-	-	-
-	-	-	-	-	-	-	-	-
238,967	-	238,967	132,365	-	132,365	261,234	-	261,234
-	-	-	-	-	-	-	-	-
<u>\$341,275</u>	<u>\$ -</u>	<u>\$341,275</u>	<u>\$274,096</u>	<u>\$ -</u>	<u>\$274,096</u>	<u>\$315,456</u>	<u>\$ -</u>	<u>\$315,456</u>

C. KAY CUMMINGS CANDIES, INC.

COMMON SIZED BALANCE SHEETS
AS OF DECEMBER 31, 1989 THROUGH DECEMBER 31, 1993

BALANCE SHEET PERCENTAGES:

	<u>From the Corporate Tax Returns</u>				
	<u>1989</u>	<u>1990</u>	<u>1991</u>	<u>1992</u>	<u>1993</u>
ASSETS:					
Cash	16.0%	0.0%	0.0%	2.2%	10.8%
Accounts receivable	61.6%	54.5%	67.2%	28.9%	28.6%
Inventories	7.0%	27.7%	17.6%	10.2%	13.1%
Depreciable assets	77.8%	92.1%	77.6%	108.7%	94.0%
Less accum. depr.	(66.6%)	(79.2%)	(66.3%)	(52.0%)	(48.1%)
Non-operating assets	<u>4.2%</u>	<u>4.9%</u>	<u>3.9%</u>	<u>2.0%</u>	<u>1.7%</u>
TOTAL ASSETS	<u>100.0%</u>	<u>100.0%</u>	<u>100.0%</u>	<u>100.0%</u>	<u>100.0%</u>
LIABILITY AND SHAREHOLDERS EQUITY:					
Accounts payable	17.2%	51.7%	30.0%	9.4%	15.1%
Notes payable (st)	0.0%	0.0%	0.0%	4.5%	3.8%
Other current liab.	0.0%	0.0%	0.0%	1.9%	4.0%
Long-term debt	0.0%	0.0%	0.0%	38.6%	29.1%
Stock and equity	<u>82.8%</u>	<u>48.3%</u>	<u>70.0%</u>	<u>45.6%</u>	<u>48.0%</u>
TOTAL LIABILITY AND STOCKHOLDERS EQUITY	<u>100.0%</u>	<u>100.0%</u>	<u>100.0%</u>	<u>100.0%</u>	<u>100.0%</u>

The historical financial information presented above is included solely to assist in the development of the value conclusion presented in this report, and it should not be used to obtain credit or for any other purpose. Because of the limited purpose of this presentation, it may be incomplete and contain departures from generally accepted accounting principles. We have not audited, reviewed, or compiled this presentation and express no assurance on it.

C. KAY CUMMINGS CANDIES, INC.

COMMON SIZED STATEMENT OF INCOME
FOR THE YEARS ENDED DECEMBER 31, 1989 THROUGH DECEMBER 31, 1993

INCOME STATEMENT PERCENTAGES:

	<u>From the Corporate Tax Returns</u>				
	<u>1989</u>	<u>1990</u>	<u>1991</u>	<u>1992</u>	<u>1993</u>
REVENUES:					
Net sales	100.0%	100.0%	100.0%	100.0%	100.0%
Cost of sales	<u>45.0</u>	<u>50.0</u>	<u>34.3</u>	<u>43.8</u>	<u>44.8</u>
GROSS PROFIT	<u>55.0</u>	<u>50.0</u>	<u>65.7</u>	<u>56.2</u>	<u>55.2</u>
OTHER INCOME	<u>.5</u>	<u>.1</u>	<u>.4</u>	<u>.1</u>	<u>.0</u>
TOTAL INCOME	<u>55.6</u>	<u>50.1</u>	<u>66.1</u>	<u>56.2</u>	<u>55.2</u>
OPERATING EXPENSES:					
Officer salaries	1.8	2.3	2.3	.0	2.0
Other salaries	10.3	13.4	8.9	11.9	9.3
Repairs	.6	.2	.2	.9	.8
Bad debts	.1	2.6	.1	1.7	.2
Rents	8.8	6.6	6.4	5.9	1.9
Taxes - other	2.6	5.0	2.7	4.0	4.0
Interest	.3	.0	.4	.1	1.7
Depreciation	1.4	.6	.5	.3	1.1
Advertising	.6	.5	.3	.3	.6
Depreciation - building	.0	.0	.0	1.4	1.3
Employee benefits	.0	.0	.0	.0	1.5
Other expenses	<u>18.4</u>	<u>17.3</u>	<u>31.6</u>	<u>20.8</u>	<u>19.6</u>
TOTAL EXPENSES	<u>44.9</u>	<u>48.6</u>	<u>53.4</u>	<u>47.3</u>	<u>43.8</u>
INCOME BEFORE TAX	10.7	1.4	12.7	8.9	11.3
INCOME TAX EXPENSE:					
State	.0	.0	.0	.0	.0
Federal	<u>.0</u>	<u>.0</u>	<u>.0</u>	<u>.0</u>	<u>.0</u>
TOTAL INCOME TAX	<u>.0</u>	<u>.0</u>	<u>.0</u>	<u>.0</u>	<u>.0</u>
NET INCOME AFTER TAX	<u>10.7%</u>	<u>1.4%</u>	<u>12.7%</u>	<u>8.9%</u>	<u>11.3%</u>

The historical financial information presented above is included solely to assist in the development of the value conclusion presented in this report, and it should not be used to obtain credit or for any other purpose. Because of the limited purpose of this presentation, it may be incomplete and contain departures from generally accepted accounting principles. We have not audited, reviewed, or compiled this presentation and express no assurance on it.

APPENDIX K

C. KAY CUMMINGS CANDIES, INC.

RATIO ANALYSIS 1989 THROUGH 1993

	<u>1989</u>	<u>1990</u>	<u>1991</u>	<u>1992</u>	<u>1993</u>
Current ratio	4.92%	1.59%	2.83%	3.64%	2.74%
Quick ratio	4.52%	1.05%	2.24%	2.74%	2.06%
Cash asset ratio	.93%	.00%	.00%	.19%	.56%
Working capital	\$212,635	\$ 83,588	\$18,190	\$202,071	\$263,350
Net sales to working capital	6.80%	1.17%	6.11%	5.1%	4.87%
Gross profit percentage	55.03%	50.00%	61.13%	56.15%	55.16%
Profit margin percentage (using after-tax inc.)	7.07%	1.16%	8.49%	7.40%	6.52%
Profit margin percentage (using before-tax inc.)	9.97%	1.44%	11.89%	10.14%	8.93%
Total expenses as percentage of net sales	45.58%	48.63%	54.24%	46.07%	46.26%
Accounts receivable turnover	7.44	7.54	4.95	5.77	5.67
Days sales in accounts rec.	49	48	74	63	64
Inventory turnover	29.60	7.41	6.47	7.16	5.56
Days sales in inventory	12	49	56	51	66
Operating cycle in days	61	93	130	114	130
Days cash	29	-	-	11	54
Return on assets (on after-tax income)	32.40%	4.76%	28.25%	26.15%	18.49%
Return on assets (on before-tax income)	45.74%	5.89%	39.57%	35.82%	25.35%
Return on equity (on after-tax income)	39.13%	9.85%	40.35%	34.44%	27.78%
Return on equity (on before-tax income)	55.23%	12.20%	56.51%	47.18%	38.08%
Net sales to fixed assets	40.99	31.73	29.52	42.48	53.72
Total liabilities to total assets	.17	.52	.30	.24	.33
Debt to equity	.21	1.07	.43	.32	.50
Times interest earned	32.37	35.74	31.81	105.59	71.50
Financial leverage	1.03	1.03	1.03	1.01	1.01
Fixed assets to equity	.14	.27	.16	.11	.08

Z Score - Private Company (1) 9.35 5.31 6.65 3.08 3.31

(1) A "Z" Score less than 2.9 indicates potential bankruptcy

The historical financial information presented above is included solely to assist in the development of the value conclusion presented in this report, and it should not be used to obtain credit or for any other purpose. Because of the limited purpose of this presentation, it may be incomplete and contain departures from generally accepted accounting principles. We have not audited, reviewed, or compiled this presentation and express no assurance on it.

ADDENDUM "E"

CHRONOLOGY OF SIGNIFICANT EVENTS

CHRONOLOGY OF SIGNIFICANT EVENTS

<u>DATE</u>	<u>EVENT</u>
8/25/92	Mrs. Cummings files Complaint for divorce and asks for conservator to be appointed for her allegedly mentally incompetent husband
9/21/92	Mr. Cummings files his Answer
10/21/92	Mrs. Cummings asks court for order requiring Mr. Cummings to submit to mental examination
12/17/92	Mr. Cummings requests protective order from court allowing him not to respond to plaintiff's discovery requests until after conservatorship issue is decided
12/21/92	Mr. Cummings forwards requested financial documents to Commissioner Arnett
2/2/93	Court orders Mr. Cummings to undergo mental examination to determine competency
2/2/93	Court grants protective order allowing Mr. Cummings not to respond to discovery requests until after conservatorship issue is decided
7/19/93	Mrs. Cummings asks trial court to appoint David Posey, CPA, as independent expert to perform valuation of business
9/3/93	Mr. Cummings moves for summary judgment on conservatorship issue
9/14/93	Court appoints David Posey as independent expert
9/24/93	Mrs. Cummings concedes that summary judgment should be granted on conservatorship issue because her nominated medical expert found Mr. Cummings mentally competent to run the business
10/22/93	Commissioner Evans, by court order, restrains both parties from having any physical contact with each other at all times and places
10/27/93	Court lifts protective order regarding discovery

CHRONOLOGY OF SIGNIFICANT EVENTS

<u>DATE</u>	<u>EVENT</u>
11/4/93	Two trustees of Cummings Family Trust move to intervene in divorce action on grounds that the trust owns property subject to the divorce action
11/9/93	Court signs order lifting protective order and gives Mr. Cummings thirty days to respond to outstanding interrogatories and document requests
12/1/93	Mrs. Cummings moves the trial court for an order of contempt against Mr. Cummings and for an order to compel accounting on pain of having his Answer stricken and default entered
12/8/93	Mr. Cummings files response to 12/1/93 motion and denies allegations
12/9/93	Commissioner Evans orders Mr. Cummings to provide an accounting, pay past-due alimony, and respond to discovery requests within 10 days
12/22/93	Mr. Cummings files Certificate of Service with court stating that he hand-delivered his responses to interrogatories and document requests
1/4/94	Mrs. Cummings files objection to trustees motion to intervene
1/10/94	Trustees move to strike affidavits of Mrs. Cummings and her attorney
1/31/94	Court enters Findings of Fact, Conclusions of Law and Order denying trustees motion to intervene on basis that Mr. Cummings, also a trustee of the trust, could adequately represent trust's interests in divorce proceeding
2/6/94	Mr. Cummings suffers first of two heart attacks, is hospitalized, and does not return to work until middle of March
2/18/94	Court signs Findings, Conclusion and Order dismissing plaintiff's petition for conservatorship
3/21/94	Mrs. Cummings moves court to issue order striking Mr. Cummings' Answer and to enter his default. She also asks Mr. Cummings, among

CHRONOLOGY OF SIGNIFICANT EVENTS

<u>DATE</u>	<u>EVENT</u>
	other things, to supplement his interrogatories and provide an accounting
3/31/94	Mr. Cummings files verified response and objection to 3/21/94 motion asserting that his interrogatories were timely and complete and that he had cooperated with court-appointed expert
5/10/94	Court grants motion to compel and requires Mr. Cummings to supplement his interrogatory answers, to cooperate in appraisal of building, and to provide documents related to Cummings Family Trust
5/10/94	Mr. Cummings is readmitted to hospital where he undergoes multiple bypass surgery. He is discharged on 5/18/94 and underwent period of cardiac rehabilitation
6/6/94	Mrs. Cummings files motion for sanctions and again asks that Mr. Cummings' Answer be stricken and his default entered
6/20/94	Court-appointed expert sends letter to Mr. Cummings stating that he had received all of the requested information from Mr. Cummings.
6/23/94	Mr. Cummings files objection to 6/6/94 motion for sanctions and to strike Answer and attaches 6/20/94 letter from court-appointed expert
7/11/94	Commissioner Evans recommends that Mr. Cummings' Answer be stricken and his default entered
7/21/94	Mr. Cummings files objection to Commissioner's recommendations and asserts that, despite his health problems, he had complied with court's prior orders
7/26/94	Mr. Cummings files with court a Certificate of Service Discovery stating that he had mailed monthly accounting, with exhibits, to opposing counsel, pursuant to court order
9/1/94	Court-appointed expert mails his valuation report to the court A copy is also provided to the parties

CHRONOLOGY OF SIGNIFICANT EVENTS

<u>DATE</u>	<u>EVENT</u>
11/7/94	Court takes under advisement recommendation of Commissioner that default be entered
11/21/94	Court orders plaintiff's attorney to notify Mr. Cummings of those items of discovery and other court orders with which Mr. Cummings had not yet complied
1/11/95	Court orders Mr. Cummings to produce documents and other discovery requests, submitted earlier to him on December 1, 1994 by Mrs. Cummings, by no later than 1/18/95.
1/31/95	Court orders Mr. Cummings' Answer stricken and his default entered
3/6/95	Court holds evidentiary hearing in chambers to receive testimony and evidence in support of Findings of Fact and Conclusions of Law
4/7/95	Court signs Findings of Fact, Conclusions of Law, and Decree of Divorce